

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

No. 526.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET
CORPORATION, REPRESENTING THE UNITED STATES
OF AMERICA, PETITIONER,

vs.

ROGER B. WOOD, TRUSTEE IN BANKRUPTCY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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Original. Print.

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PETITION OF CLAIMANT.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

To the Honorable John J. Townsend, referee in bankruptcy:

The petition of the United States Shipping Board Emergency Fleet Corporation respectfully shows as follows:

1. It is a corporation, duly incorporated and organized under the laws of the Congress of the United States and enacted for the District of Columbia, act of March 3, 1901, chapter 854, and was so incorporated and organized in pursuance of a certain act of Congress known as the shipping act approved September 7, 1916; that all of its capital stock is now, and has always been, owned and held by and for the United States; that by the urgent deficiencies act approved June 15, 1917, and amended and extended by the urgent deficiencies act approved October 6, 1917, and by act approved April 22, 1918, by the sundry civil appropriations act approved July 1, 1918, and the deficiencies appropriations act approved November 4, 1918; all being acts of the Congress of the United States, the President of the United States was authorized and empowered, among other things:

"To place an order with any person for such ships or materials as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind, and quantity usually produced or capable of being produced by such person."

2. Pursuant to authority in said act contained, the President, by Executive orders of July 11, 1917, June 18, 1918, and December 3, 1918, delegated to petitioner, the United States Shipping Board Emergency Fleet Corporation, all authority and power in said acts conferred on him, directly or indirectly applicable to ship or shipyard plant construction, and ratified and confirmed petitioner's acts done in furtherance of said objects.

3. Pursuant to authority received from the above sources, your petitioner, representing the United States of America, entered into a certain contract, dated August 22, 1918, with the bankrupt corporation, by the terms of which the latter agreed to construct for your petitioner six (6) wooden harbor tugs, according to certain drawings and specifications. Said contract was afterwards amended by supplemental contracts, dated, respectively, January 28, 1919, and February 15, 1919; true copies of said original contract, and also said amendments, are attached hereto marked "Petitioner's Exhibit A," and are prayed to be read as a part hereof.

4. On or about the 18th day of March, 1919, in certain proceedings pending in the District Court of the United States for the District of Maryland, under the style of Henry G. Gielow against Eastern Shore Shipbuilding Corporation, receivers were appointed for the

said bankrupt corporation. Said receivers took charge of the assets and affairs of the said bankrupt, including the shipyard at Sharps-town, Md., at which your petitioner's tugs were being constructed and also all supplies and materials which were found at the said shipyard, the said receivers, acting under instructions of the above-mentioned court, refused to continue the performance of the contract above mentioned, but on the contrary positively repudiated and breached the said contract by refusing to continue the construction of your petitioner's tugs under the terms thereof. Therefore, your petitioner alleges that the bankrupt corporation has defaulted in the performance of the said contract and has ceased work thereunder and has refused to complete the tug boats although demand has been duly made to the said bankrupt to carry out the terms thereof.

5. At the time of the appointment of the receivers as above mentioned, none of your petitioner's tugs had been completed and delivered. But your petitioner alleges that in accordance with said contract and upon the faith of statements submitted to it by said bankrupt corporation, your petitioner had paid said bankrupt, prior
4 to the time of the appointment of the receivers as above mentioned, a large sum of money, to wit, the sum of \$441,017.72.

Following receivership your petitioner, by and with the consent of the United States District Court of Maryland, took actual possession of the said uncompleted hulls of the said six (6) tugs, which said uncompleted hulls were valued at that time by said bankrupt corporation at \$140,311.48. Your petitioner respectfully represents and alleges that said uncompleted hulls were at that time reasonably worth not more than \$100,000, which is the only consideration which your petitioner has thus far received for the large sum of money theretofore paid by it to the bankrupt corporation.

6. Thereafter your petitioner, in cooperation with the said receivers, expended upon the said hulls a sufficient sum of money represented by labor and materials to enable the said hulls to be launched. The cost of this work amounted to approximately \$95,091.31.

7. Your petitioner is informed that a portion of the sum of money last mentioned in the preceding paragraph was used by receivers for the purpose of paying pay roll in connection with the performance of certain work not covered by your petitioner's contract. Your petitioner is not advised as to the exact amount of this money which was expended in that manner, but your petitioner respectfully prays that the amount so expended should be ascertained and repaid to it, as was indicated would be done by the Hon. John C. Rose, judge
5 of the United States District Court for Maryland. It seems that the said money was paid to the said receivers under an erroneous impression as to what it was to be used for, which was no doubt the result of a pure misunderstanding.

8. Your petitioner alleges that as of the time when said receivers were appointed a physical inventory of all materials and supplies on hand at said shipyard show the same to have been of a value of \$260,996.45. Your petitioner alleges that it is the owner of a large

portion of the said materials and supplies, as will be seen from an examination of the books of the said bankrupt corporation, and that said materials and supplies had an inventory value of \$158,223.95.

9. Your petitioner further alleges that said materials and supplies were bought and paid for by your petitioner under the terms of its original contract and supplemental agreements above referred to, which required your petitioner to make payments for labor expended, for materials and machinery purchased and a portion of defendant's overhead expenses, and that said contract further provided in Article V thereof that—

“title to all material for the furtherance of work under this contract, however and by whomsoever contracted for or assembled or set up in the shipyard or used in the construction of the work under this contract, shall be in the owner (your petitioner) at all times.”

Petitioner alleges that it can identify all or a large part of the material and supplies owned by it and that the defendant corporation has always acknowledged and admitted your petitioner's ownership thereof.

6 10. Your petitioner further alleges that in executing the said contract and supplemental agreements with the defendant corporation above mentioned, your petitioner was acting solely as the representative of the President of the United States and as an instrumentality of the Government of the United States in pursuance of the provision of said acts of Congress above referred to, and further that the materials and supplies hereinbefore referred to are the property of the United States of America.

11. Your petitioner alleges that the contract and supplemental agreements hereinbefore referred to are not subject to State registry statutes and that the supplies and materials herein referred to are not subject to the State lien laws.

12. Your petitioner represents that it is now gathering proper data for the purpose of identifying supplies and materials located at the bankrupt's shipyard to which it claims title, a large part of which may be identified by the purchase orders covering the purchase thereof. But your petitioner respectfully alleges that regardless of its ability to identify specific articles and supplies that it is entitled to a proper proportion of the value of all materials and supplies which were found at the said shipyard.

Wherefore your petitioner prays that an order be entered authorizing and directing your petitioner to take possession of its said materials and supplies at the shipyard plant of said bankrupt, of the inventory value of \$158,223.95, and in the event it should be determined that the said supplies and materials should be sold

7 without awaiting the determination of your petitioner's title thereto, that your petitioner may be properly protected by providing that the said materials shall be sold separately and that the proceeds therefrom shall stand in place of the materials to which your petitioner is now asserting title. Your petitioner further prays that its claim against the bankrupt may be approved and sustained in

the amount of \$341,017.72 less the value of such supplies and materials as may be delivered to it under the prayer above made. Your petitioner further prays that as an agency of the United States Government, it may be given priority in the distribution of the assets of the said bankrupt, in accordance with statutes made and provided therefor.

Respectfully submitted.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By J. L. ACKERSON, *Vice President.*

FRANCIS G. CAFFEY,
Solicitor for Petitioner, U. S. Attorney.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 30th day of August, 1919, before me, G. de Figanieri, a notary public, personally came J. L. Ackerson, to me known, and being sworn, did depose and say that he is the vice president of the United States Shipping Board Emergency Fleet Corporation, the corporation described in and which executed the foregoing petition, and that the facts stated in the foregoing petition are true to the best of his knowledge and belief, and thereupon the said J. L. Ackerson duly acknowledged same before me on the date aforesaid.

[NOTARIAL SEAL.]

G. DE FIGANIERE,
Notary Public.

My commission expires February 24, 1923.

ANSWER OF TRUSTEE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

For his answer to the petition of the United States Shipping Board Emergency Fleet Corporation, Roger B. Wood, trustee in bankruptcy in this proceeding, respectfully alleges:

First. Admits that the United States Shipping Board Emergency Fleet Corporation, hereinafter referred to as the corporation, is a corporation duly incorporated and organized under the laws of Congress of the United States and enacted for the District of Columbia by act of March 3, 1901, chapter 854, and was so incorporated and organized in pursuance of said act of Congress, known as the shipping act, approved September 7th, 1916; but denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in paragraph marked "1" of said petition.

Second. Denies each and every allegation contained in paragraph marked "2" of said petition.

Third. That on or about the 22nd day of August, 1918, a contract was made between the bankrupt and the United States Shipping Board Emergency Fleet Corporation by the terms of which the bankrupt agreed to construct for the said corporation six harbor tugs, and that said contract was afterwards amended by supplemental contracts, dated, respectively, January 28th, 1919, and February 15th, 1919; but denies that as matter of law the United States of America was the party with whom the bankrupt contracted, and denies each and every other allegation contained in paragraph marked "3" of said petition.

Fourth. Admits that on or about the 18th day of March, 1919, in a certain proceeding brought in the District Court of the United States for the District of Maryland, under the style of Henry G. Gielow, against the Eastern Shore Shipbuilding Corporation, receivers were appointed for the said corporation, and that they took charge of the assets and affairs of said corporation, including
10 its shipyard at Sharpstown, Md., at which the tugs of the Fleet Corporation were being constructed; but denies each and every other allegation contained in paragraph marked "4" of said petition, except that he admits that the tugs of said Fleet Corporation were not completed by the bankrupt.

Fifth. Admits that at the time of the appointment of the receivers, as above mentioned, none of the tugs of the corporation had been completed, but denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in paragraph marked "5" of said petition.

Sixth. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "6" of said petition.

Seventh. Denies each and every allegation contained in paragraph marked "7" of said petition.

Eighth. Denies knowledge or information as to so much of the allegations contained in paragraph marked "8" of said petition as alleges that as of the time when receivers were appointed a physical inventory of all materials and supplies on hand at the shipyard of the bankrupt showed the same to have been of a value of \$260,996.45, and denies each and every other allegation in said paragraph contained.

Ninth. Denies each and every allegation contained in paragraphs marked "9," "10," "11," and "12" of said petition.

Wherefore the undersigned prays that an order be entered dismissing the aforesaid petition of the United States Shipping
11 Board Emergency Fleet Corporation, adjudging that said corporation has no valid title or claim in and to any part of the assets in the hands of the trustee, or in and to any special fund arising out of the use of any of the materials mentioned in the petition of said corporation; and directing that the said corporation pay over to the undersigned the sum of nine thousand nine hundred ninety-five and 45/100 (\$9,995.45) dollars withheld by said corpora-

tion under the terms of the order of Hon. John C. Rose, dated February 9th, 1920, or, in the alternative, require the said corporation to show cause why said sum should not be paid over to the undersigned, and why such other and further relief should not be granted as may be just and proper in the premises.

ROGER B. WOOD,
Trustee in Bankruptcy.

UNITED STATES OF AMERICA,
*Southern District of New York,
City and County of New York, ss:*

Roger B. Wood, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ROGER B. WOOD.

Sworn to before me this 20th day of March, 1920.

AMBROSE JOYCE,
Notary Public.

NOTICE OF HEARING BEFORE REFEREE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

SIR: Please take notice that upon the petition of the United States Shipping Board Emergency Fleet Corporation, heretofore filed in the office of the referee in bankruptcy on or about the 2nd day of September, 1919, and upon the answer of the trustee to said petition, dated the 20th of March, 1920, the undersigned will, on the 1st day of April, 1920, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, make application before the referee in bankruptcy at his office, No. 68 William Street, borough of Manhattan, New York City, for an order or decree, substantially as follows:

(1) Dismissing the said petition on the ground that it is insufficient on the face thereof, as matter of law, to entitle the said United States Shipping Board Emergency Fleet Corporation to an order for the return of any materials which may heretofore have come into the possession of the receivers or trustee.

(2) Adjudging that the United States Shipping Board Emergency Fleet Corporation had and has no valid title or claim thereof in and to any such materials, and that the claim or title or lien, if any, of said United States Shipping Board Emergency Fleet Corporation is void as against the receivers and trustee in bankruptcy herein.

(3) Adjudging that the valid title to the aforesaid materials was and now is in the receivers or their successor trustee in bankruptcy.

(4) Adjudging that the United States Shipping Board Emergency Fleet Corporation has no valid claim of title or lien of any nature or description in and to a certain special fund heretofore turned over by the United States Shipping Board Emergency Fleet Corporation to the receivers or to the trustee in bankruptcy under an order of Hon. John C. Rose, United States district judge for the district of Maryland, amounting to \$18,787.39, and for an order directing that the said sum be turned over to the trustee in bankruptcy as the property and assets of this estate, free of all claims of title, lien, or other incumbrances of the said United States Shipping Board Emergency Fleet Corporation.

(5) Directing that the United States Shipping Board Emergency Fleet Corporation pay over to the trustee in bankruptcy herein the sum of \$9,995.54 withheld by said corporation under the terms of the order of Hon. John C. Rose, dated February 9th, 1920, or in the alternative, requiring the said corporation to show cause, if any there be, why said sum should not be paid over to the trustee.

(6) Directing the taking of testimony or depositions, if the same be necessary in respect to the issues raised by the petition and answer aforesaid, and making proper provision for the payment of the expense of taking such testimony or depositions, in such manner as may be deemed just and proper by this court.

Please take notice further that application will be made for such other and further relief as may seem just and proper in the premises, and which may not have been specifically enumerated or stated in this notice of motion.

Dated, New York, March 22, 1920.

Yours, etc.,

ROSENBERG & BALL,
Attorneys for Trustee,
Office and Post Office Address,
No. 74 Broadway, New York City.

TO FRANCIS G. CAFFEY, ESQ.,

*United States Attorney, Attorney for U. S. Shipping Board
Emergency Fleet Corporation, Post Office Building, New York
City.*

15

AMENDED ANSWER OF TRUSTEE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

For his amended answer to the petition of the United States Shipping Board Emergency Fleet Corporation, Roger B. Wood, trustee in bankruptcy in this proceeding, respectfully alleges:

First. Admits that the United States Shipping Board Emergency Fleet Corporation, hereinafter referred to as the corporation, is a

corporation duly incorporated and organized under the laws of Congress of the United States, and enacted for the District of Columbia by act of March 3, 1901, chapter 854, and was so incorporated and organized in pursuance of said act of Congress, known as the shipping act, approved September 7th, 1916; but denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in paragraph marked "1" of said petition.

Second. Denies each and every allegation contained in paragraph marked "2" of said petition.

16 Third. That on or about the 22nd day of August, 1918, a contract was made between the bankrupt and the United States Shipping Board Emergency Fleet Corporation by the terms of which the bankrupt agreed to construct for the said corporation six harbor tugs, and that said contract was afterwards amended by supplementary contracts, dated respectively January 28th, 1919, and February 15th, 1919; but denies that as matter of law the United States of America was the party with whom the bankrupt contracted, and denies each and every other allegation contained in paragraph marked "3" of said petition.

Fourth. Admits that on or about the 18th day of March, 1919, in a certain proceeding brought in the District Court of the United States for the District of Maryland, under the style of Henry G. Gielow against the Eastern Shore Shipbuilding Corporation, receivers were appointed for the said corporation, and that they took charge of the assets and affairs of said corporation, including its shipyard at Sharpestown, Md., at which the tugs of the Fleet Corporation were being constructed; but denies each and every other allegation contained in paragraph marked "4" of said petition, except that he admits that the tugs of said Fleet Corporation were not completed by the bankrupt.

Fifth. Admits that at the time of the appointment of the receivers, as above mentioned, none of the tugs of the corporation had been completed; but denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in paragraph marked "5" of said petition.

17 Sixth. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked "6" of said petition.

Seventh. Denies each and every allegation contained in paragraph marked "7" of said petition.

Eighth. Denies knowledge or information as to so much of the allegations contained in paragraph marked "8" of said petition as alleges that as of the time when receivers were appointed a physical inventory of all materials and supplies on hand at the shipyard of the bankrupt showed the same to have been of a value of \$260,996.45, and denies each and every other allegation in said paragraph contained.

Ninth. Denies each and every allegation contained in paragraphs marked "9," "10," "11," and "12" of said petition.

Tenth. That a petition has heretofore been filed by the United States Shipping Board Emergency Fleet Corporation with the Hon. John C. Rose, judge of the United States District Court of the District of Maryland, in the equity proceedings herein, in which the Fleet Corporation claimed the materials referred to in its petition on file with the referee in this proceeding upon the ground that it is an agency of the Government, and as such not subject to the lien laws of the different States, including the State of Maryland.

Eleventh. That the said petition was duly heard and considered by the Hon. John C. Rose, who had jurisdiction to consider the same at the time, and that after due hearing of said petition the Hon. John C. Rose made a decision, which decision has been duly filed with the records in the equity proceedings, dismissing the petition of the Emergency Fleet Corporation. That the relief sought for in said petition was substantially the same as is sought for in the present petition on file; and that the matters mentioned in said petition, and the issues raised thereby are substantially the same matters and same issues as are raised by the present petition, and that such matters and issues have been fully determined and decided by the United States District Court for the District of Maryland, and that the same are now res adjudicata, and that the present petition of the Emergency Fleet Corporation should for that reason be dismissed.

Wherefore the undersigned prays that an order be entered dismissing the aforesaid petition of the United States Shipping Board Emergency Fleet Corporation adjudging that said corporation has no valid title or claim in and to any of the assets in the hands of the trustee or in and to any special fund arising out of the use of any of the materials mentioned in the petition of said corporation; and directing that the said corporation pay over to the undersigned the sum of nine thousand nine hundred and ninety-five and 45/100 (\$9,995.45) dollars withheld by said corporation under the terms of the order of Hon. John C. Rose, dated February 9th, 1920, or in the alternative, require the said corporation to show cause why said sum should not be paid over to the undersigned, and why such other and further relief should not be granted as may be just and proper in the premises.

ROGER B. WOOD,
Trustee in Bankruptcy.

UNITED STATES OF AMERICA,

Southern District of New York, City and County of New York, ss:

Roger B. Wood, being duly sworn, says that the foregoing amended answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ROGER B. WOOD.

Sworn to before me this 26th day of April, 1920.

GEORGE J. LEDERER,
Notary Public.

20 TESTIMONY BEFORE REFEREE.

United States District Court, Southern District of New York.
In the matter of Eastern Shore Shipbuilding Corporation, bankrupt, in bankruptcy.

NEW YORK, April 1, 1920—2 o'clock p. m.
Before Hon. Peter B. Olney, referee.

Motion to establish priority claim for \$328,017.72, etc.

Appearances:

Messrs. Rosenberg & Ball, attorneys for the trustee, by Mr. Rose, of counsel.

Francis G. Caffey, Esq., United States attorney, attorney for claimant.

Henry J. Gibbons, Esq., assistant counsel, United States Shipping Board Emergency Fleet Corporation.

Edward F. Unger, Asst. U. S. attorney, of counsel.

21 Mr. ROSE. Before proceeding with any examination, the trustee desires to reserve his right to file an amended answer and asks leave of the referee to do so.

Mr. GIBBONS. We have no objection to that.

Mr. ROSE. Now, I have a further preliminary motion to make, and that is a motion on the pleadings for a ruling that the United States Shipping Board Emergency Fleet Corporation is not entitled to priority of payment as a matter of law, and in consenting to the admission or placing on the record of any testimony, the trustee reserves his right to press such preliminary objections and any other preliminary objections on questions of law or form.

Mr. GIBBONS. All right.

FRANK J. BRANDT, a witness called on behalf of the claimant, having been first duly sworn, testified as follows:

Direct examination by Mr. GIBBONS:

Q. Mr. Brandt, what is your position with the United States Shipping Board Emergency Fleet Corporation?

A. District auditor of the Emergency Fleet Corporation.

Q. What district?

A. Middle Atlantic District.

Q. Is the Eastern Shore Shipbuilding Corporation plant, is that in your district?

A. Yes, sir.

Q. Located where?

A. Sharptown, Maryland.

22 Q. Mr. Brandt, were all payments which were made by the United States Shipping Board Emergency Fleet Corporation to the Eastern Shore Shipbuilding Corporation made through your office?

Mr. ROSE. Objected to on the ground that the checks or other evidences of payment are the best evidence—all right, I withdraw the objection.

Q. Tell us, Mr. Brandt, what the duties are of the auditor, in a general way?

A. Vouchers are submitted by the contractor—

The REFEREE. You mean not of the auditor, what your duties are as auditor.

Mr. GIBBONS. Yes; what his duties are. (Witness continuing.) The vouchers are submitted by the contractors through the resident auditors, and the resident inspectors located at the various plants after they have checked them and found that they are correct in accordance with the terms of the contract, they are forwarded to the district auditor's office for payment. After review and examination, if we find that the payments are in accordance with the terms of the contracts, they are passed to the disbursing officer, after having been properly approved by the proper parties in the ship construction division; that generally covers the duties of the auditor.

Q. Were all of the vouchers that were issued in connection with the Eastern Shore Shipbuilding Corporation contracts, paid through the district office?

A. To the best of my knowledge; yes, sir; I don't know of any that were paid anywhere else.

23 Q. And how much was paid out on account of the construction of these six tugs at the time of the insolvency of the contractor?

A. We paid direct to the Eastern Shore Shipbuilding Corporation, prior to the appointment of the receiver, \$424,850 in progress payments, covering progress as set forth in the contract, and we paid for increased labor cost \$3,167.72, making a grand total to the Eastern Shore Shipbuilding Corporation of \$428,017.72.

Mr. ROSE. Now, I object to that evidence and move to strike it out upon the ground that there is no proof of the basis of arriving at those figures, and upon the ground that the witness has not shown the basis of his knowledge, or that he has any knowledge as to the actual payments, no checks or other evidences of payment having been produced. That is a serious objection because there is a wide discrepancy in the figures.

Q. That is a summary of the figures?

A. From our ledgers, yes, sir.

By Mr. ROSE:

Q. Have you the ledgers here?

A. No, sir.

Mr. ROSE. I renew the objection and reserve the request for a ruling.

Mr. GIBBONS. Mr. Rose can, at any time examine the details of this account, the vouchers themselves and the ledgers, by making an appointment with Mr. Brandt at the district office, 605 Lexington Building, Baltimore.

Mr. ROSE. With the understanding, of course, that I can call for the production of the original papers at any time.

Mr. GIBBONS. Absolutely; yes.

The WITNESS. If you are interested in the checks, you might as well get the checks, you might as well get this thing cleared up, too.

Q. What is that?

A. If Mr. Rose is interested in the checks that touch on that point—

Mr. GIBBONS. He can go into the thing.

By Mr. GIBBONS:

Q. Now, Mr. Brandt, these figures you have given can be divided up among the different hulls, I suppose, and gone into details that may be required?

A. Yes, sir.

Q. On a subsequent occasion, if necessary?

A. My ledgers will show the figures as to each hull.

Q. Now, Mr. Brandt, at the time that this contractor became insolvent these hulls were not completed, were they; these tugs?

A. No, sir; they were not.

Q. And what happened then?

Mr. ROSE. Will you specify a little more particularly just what—

Q. Well, receivers were appointed by the District Court in Maryland, weren't they?

A. I am not prepared to say whether it was by the District Court of Maryland or District Court of the Southern District of New York.

Mr. ROSE. It is conceded that the receivers were appointed by the District Court of Maryland.

Q. And then what was done with the tugs?

A. The tugs were completed by the Fleet Corporation.

Q. The hulls?

A. The hulls; the tugs were never.

Q. I mean they were completed so that they could be launched?

A. Launched and delivered from the yard of the Eastern Shore Shipbuilding Corporation.

Q. And after the receivers were appointed payments were made, I suppose, to the receivers?

A. Some moneys were paid direct to the receivers.

Q. How much was paid out direct to the receivers?

A. \$58,754.25.

Mr. ROSE. Same objection as made to the other testimony.

Mr. GIBBONS. I think that is all I want from Mr. Brandt at this time.

The WITNESS. Then there were some other moneys that we paid out.

Q. Yes; what other moneys were paid out on account of this contract and to whom?

A. Payments were made through the resident auditor at the plant direct to vendors.

Q. Who was that?

A. Mr. Arthur Campbell; he disbursed for our account \$36,434.38.

Q. To whom?

A. Principally salaries and miscellaneous expenses around the yard; just incidental expenses, but principally pay roll.

26 Q. For work under the contract?

A. Under the contract; yes; then we paid direct to vendors for materials delivered, which were necessary to purchase before we could launch the boats, \$39,973.02.

Q. What do you mean by vendors—material men, subcontractors?

A. Material men and subcontractors; yes.

Q. That makes a total amount paid out under the contract of how much?

A. \$563,179.37.

Mr. GIBBONS. That is all.

Cross-examination by Mr. ROSE:

Q. What did you say your duties were as district auditor?

A. To approve for payment such vouchers that were submitted by the contractors through our resident forces at the various yards.

Q. And the total payments made, as you say, on account of this contract with the Emergency Fleet Corporation was how much?

A. To the receivers?

Q. The total payments.

A. The total that we paid to complete the boat or to get the boat away from that plant—

Q. I didn't ask you that; I mean the total payments made by the Emergency Fleet Corporation for any reason whatsoever on this contract relating to these particular six boats is how much?

A. When you put that question on account of this contract—

Mr. GIBBONS. Grand total, he means.

The WITNESS. Because he paid to the Eastern Shore on account of the contract—

Q. Subdivide your answer, then. How much did you pay to the Eastern Shore and how much to the receivers?

A. To the Eastern Shore \$428,017.72.

Q. And to the receivers?

A. \$58,754.25.

Q. Now, these figures are calculated by you from what records?

A. From original records, signed vouchers, as recorded in our books of original entry.

Q. And who keeps those books?

A. They are kept in the district accountant's office at Baltimore.

Q. Is that under your supervision?

A. Well, now, the complete organization is—

Q. Is that office under your supervision?

A. Not directly.

Q. And you haven't personal knowledge of the accuracy of the books kept in the district accountant's office?

A. I know that those figures are correct.

Q. But you have no personal knowledge?

A. From my own knowledge, personal knowledge, I know that they are correct.

Q. Have you examined the books?

A. I have.

Q. And you have checked up these figures yourself?

A. Yes, sir.

Q. In what way have you checked them up; what examination have you made of the books to satisfy yourself that the entries are accurate, so that you can testify here of your own personal knowledge that these figures are correct?

A. I have made a personal examination of the books.

Q. Now, that is not a part of your duties, is it?

A. It is so; I sent the report upon the condition of the accounts each month.

Q. Well, these reports are submitted to you for approval, are they?

28 A. Submitted to me; I sign the reports and the originals that are prepared throughout the month.

Q. And in what books of the district accountant's office are these particular entries kept?

A. Various books.

Q. Will you specify the books, so they may be examined, if found necessary?

A. They will be found in our general ledgers, also in the general subsidiary ledgers.

Q. What are those subsidiary ledgers?

A. Hull account, undistributed advances; I think that would cover it all, generally.

Q. Will you explain to me the precise procedure that prevails with reference to passing the voucher—before you answer, let me specify a little in detail—just how would the district auditor's office go about passing the payment through and sending a check for it?

A. Do you want all the—

Q. I want the method of doing business.

A. The details, you want to know—to whom the voucher was passed, from person to person, what they did with it?

Q. No; you need not specify every particular employee of the Shipping Board; what I mean is this: Supposing the Eastern Shore Shipbuilding Corporation should send a voucher to the United States Shipping Board to be paid, or approved and paid; what was the voucher for, what was the method of handling it from the Eastern Shore Shipbuilding Corporation to the Shipping Board, and whom would the payment of that voucher be made to in each case?

A. The Eastern Shore Shipbuilding Corporation would prepare the vouchers at their plant and submit them to the resident
29 inspector and the resident auditor; if they found them correct, they approved them and they were sent to the Baltimore office.

They were then submitted to the Ship Construction Division, and if the voucher met with their approval, principally as concerned physical progress, they signed the voucher and the voucher was returned to our office and was checked by a contract clerk against the contract. After all signatures appeared thereon, and the district auditor or his assistant was satisfied that the voucher was in order for payment, he signed same and the voucher was transmitted to the accounting branch for purposes of record and was entered into the subsidiary ledgers and the general ledgers and assigned a number and then transmitted to the disbursing officer, who drew the check to the order of the Eastern Shore Shipbuilding Company for the amount of the approved voucher; that check was then mailed to the Eastern Shore Shipbuilding Corporation.

Q. In other words, every payment would be made direct to the Eastern Shore Shipbuilding Corporation?

A. Yes, of this \$428,000, that all was made direct to them.

Q. Now, the Eastern Shore Shipbuilding Company would, of course, receive materials ordered by it direct from the vendors and place it in the yard, wouldn't it, was that the practice?

A. I suppose I would say that it was.

Q. And after taking possession of that material, it would retain that possession, and after getting the bill from the vendor, would submit a voucher to the Shipping Board, through its various departments, asking for the payment of the amount of that bill?

A. No, no; not by a long shot.

30 Q. You mean that several payments were lumped into one voucher?

A. I don't mean anything of the sort.

Q. Will you explain it?

A. The Eastern Shore Shipbuilding Corporation, the same as any other contractor, submitted to us vouchers purporting to be a progress payment, which they claimed to be due them for work done at that time, or to that point, and it was customary to make a voucher read after this order, that contract provided for ten progress payments, and each one was lettered, whatever the 10th letter in the alphabet is, probably payment D, being 10% of contract price on vessel when centered and sister keels on; I am just giving this as an example. Sister keels are in place, cone frames erected, and stem and stern posts up, or its equivalent in work done; that was progress payment D in the contract—

Q. Let me see if I understand you correctly. The only payment that would be made by the Shipping Board would be lump sum progress payments?

A. Yes, sir.

Q. In other words, each payment would be in the neighborhood of around \$46,000, as provided by the contract?

A. No, each payment was \$14,650.

Mr. GIBBONS. One-tenth.

Q. Oh, I see, 10% was paid?

A. Yes, sir.

Q. But in no case was any payment made by the Shipping Board to the particular vendor of merchandise that was supplied to the Eastern Shore Shipbuilding Corporation; by that I mean they generally simply sold goods to the Eastern Shore Shipbuilding

31 Corporation, the Shipping Board didn't pay for that merchandise, did it, in any case?

A. Yes, I will say that we did.

Q. Before the receivership?

A. Before the receivership.

Q. How much was paid in that way?

Mr. GIBBONS. He gave an item of that.

A. Now, when this contract was let, the first payment known as payment A was placed in a control cash account. Now, I don't recall how many boats there were—

Mr. GIBBONS. Six.

Q. Six boats?

A. Six boats; well, that would be six times \$14,650 was paid in a control cash account, and we supervised the spending of that money.

Q. What was that for?

A. Principally for materials.

Q. Well, now, I asked you a very simple question, and I think you can answer it; in no case where merchandise was required for the building of ships in the yard, or ordered by the Eastern Shore Shipbuilding Corporation, was that merchandise ever paid for direct to the creditor of the Eastern Shore Shipbuilding Corporation by the Shipping Board?

A. By checks countersigned by officials of the Shipping Board.

Q. Whose checks?

A. Checks drawn on the control cash account.

Q. By whom?

A. By the Eastern Shore Shipbuilding Corporation and signed by the Emergency Fleet Corporation.

32 Q. Now, let us see; when these progress payments—or let us say this first payment, this control cash account—

A. Payment A.

Q. Payment A consisting of \$84,000, was signed over to the Eastern Shore Shipbuilding Corporation, the only right reserved by the Shipping Board or the Emergency Fleet Corporation was the countersigning of any checks drawn by the Eastern Shore?

A. Not in that way.

Q. Wouldn't these—

A. (Interrupting.) Now, let me answer your question. Where we reserved any rights in depositing money in the bank, it was done with the understanding that until that money was finally disbursed, title thereto was vested in the United States Shipping Board Emergency Fleet Corporation.

Q. Now, is this the only such payment made to the Eastern Shore Shipbuilding Corporation by the Shipping Board?

A. Payment A on each boat.

Q. Just payment A?

A. Yes, it was some \$87,000.

Q. And that has all been disbursed, so far as you know?

A. No.

Q. That particular account?

A. Yes.

Q. Now, following the liquidation of that particular account, you made no further payment of a similar nature to the Eastern Shore Shipbuilding Corporation, where you required the right in countersigning checks made by them in payment of materials, did you?

A. No.

Q. And what was the reason for discontinuing the practice of having the Emergency Fleet Corporation countersign all checks for the payment of material?

A. The contract very clearly provided for that, that the cash payment A was to be deposited in a joint control account.

33 Q. But no other payments were to be subject to the joint control?

A. No.

Q. In other words, putting aside payment A for the moment, payment A could be disposed of in any way that the Eastern Shore Shipbuilding Corporation saw fit?

A. No, sir; I wouldn't say that.

Q. I mean, if vouchers had been submitted to the Shipping Board—

A. I wouldn't say that; no, sir.

Q. How would they dispose of the money, was it subject to your control and supervision?

A. It was not subject to our control or supervision in the sense that we signed the checks, but I didn't think that the fact that we paid them the money gave them the right to do with it as they saw fit.

Mr. ROSE. I move to strike out that last part as not responsive to the question, and being a mere conclusion of the witness.

Q. You don't know personally, do you?

A. Don't know personally what?

Q. Whether the Eastern Shore Shipbuilding Corporation had distributed that money without any restrictions on the part of the Shipping Board?

A. Make your question a little clearer there.

Mr. ROSE. I will ask another question.

Q. In the case of all payments other than payment A, upon the making of the particular payment by the Shipping Board to the Eastern Shore Shipbuilding Corporation, what restrictions, if any, on the disbursement of the amount of that payment was placed on the Eastern Shore Shipbuilding Corporation by the Shipping

34 Board, or was the Eastern Shore Shipbuilding Corporation free to pay its bills and other liabilities out of that money, in accordance with its regular way of doing business?

A. We had no direct control over their money, any more so than we would have with any other contract of a similar nature, but morally they were in duty bound to do that.

Mr. ROSE. I move to strike that out as not responsive to the question.

Q. Your answer is that you had no direct control over the disbursement of the money?

A. No direct control.

Q. So that the Eastern Shore Shipbuilding Corporation could, at will, pay its own creditors directly for merchandise ordered by it, even if that merchandise was intended to be used on Emergency Fleet boats?

A. Yes.

Q. And is your answer now that as to all payments except payment A, no payments were made either directly or under the control of the Shipping Board to the particular creditor who supplied the Eastern Shore Shipbuilding Corporation with any particular merchandise?

A. Prior to the receivership, yes.

Q. Now, who was your resident inspector at the yard, will you give me his name and address?

A. Mr. Beckerly can give you that better than I can.

Mr. ROSE. Well, withdraw that question; I will reserve that.

Q. Now, Mr. Brandt, you were reading from the papers which you have in front of you?

A. Yes, sir.

35 Mr. ROSE. May I see them?

Mr. GIBBONS. Did you bring an extra copy of them?

The WITNESS. Yes, sir; this is only one; I read from this first sheet here.

Mr. GIBBONS. I will give you a set of these, so that you can find out what you want to find out down there.

Mr. ROSE. Are you offering them in evidence?

Mr. GIBBONS. No. We can offer them in evidence by agreement, if you want to.

Q. Now, Mr. Brandt, these papers that you have been reading from are merely memorandums for your own information?

A. No; they are true statements of the account.

Q. I mean they are simply memorandums with which you have supplied yourself for the purpose of testifying, whether true or not?

A. No; these figures—

Mr. ROSE. I withdraw the question. Mr. Gibbons, these memoranda are not offered by you in evidence, are they?

Mr. GIBBONS. They are just copies of items from the books, calculations.

The WITNESS. They were gotten up principally for your purpose.
Mr. GIBBONS. Oh, yes.

Q. Have you these payments in here somewhere?

A. You mean the progress payments?

Q. Yes.

A. No; those progress payments do not appear in detail.

36 Q. Now, will you be able to supply me, Mr. Brandt, with the date of these progress payments?

A. Yes.

Q. Which have been testified to by you?

A. Yes; I can give you a detailed statement showing the date of the voucher and the dates the payments were made.

Q. And will you prepare such a statement and send it to me, with Mr. Gibbons's approval?

A. I will send it to you through Mr. Gibbons.

Q. Now, this item of increased cost of labor; what is that?

A. Under the terms of the contract, the contractor was protected on account of any increase that the Fleet Corporation may make in rates of workmen's pay above his base rate; in other words, I will give you an example: If his base rate for a carpenter was 50 cents, and we established a rate of 60 cents in order to hold that class of labor, we reimbursed the contract with the difference between his base rate and the rate that we had established.

Q. This item of twenty-eight thousand some-odd dollars, referred to as payment by the Fleet Corporation to vendors—just what is that?

A. Where is that twenty-three thousand dollars?

Q. Twenty-eight thousand seven hundred and fifty something, Exhibit 2, you have it here?

A. Oh, payment by E. F. C. to vendors?

Q. Yes?

A. \$28,752.63.

Q. What is that?

A. Represents materials that we purchased, various items.

Q. You mean the Emergency Fleet Corporation paid the vendors for that material direct?

A. Yes; that, I think, you will find comes in after the receivership, under the heading there "Paid during receivership."

37 Q. And that was for the purpose of doing further work on the boats after the Eastern Shore Shipbuilding Corporation had discontinued operations on your boats?

A. To put the boats in such shape that they could be launched.

Q. What is this item of \$9,300 disbursed by the receiver and your resident auditor?

A. Some of that was for material and pay rolls and labor; if you look further now, to the next page, you will find itemization, Exhibit 3, showing itemization page—we show you that \$83,052.20 was disbursed on account of our work and that the receiver spent \$9,995.45 of the money that we advanced them for other work.

Q. Now, with reference to this—you are referring to this so-called pay-roll payment, this sum of nine thousand some-odd dollars which you have just mentioned; isn't that the amount which you claim the receivers diverted from the Emergency Fleet work to other work?

A. Yes.

Q. And in what book is there a record of such payments?

A. The receivers' book.

Q. Where did you get your figures from on that item?

A. Got the figures from Mr. Roger B. Wood's books here in New York City.

Q. Who got them?

A. Mr. Timberlake.

Q. Whom is he connected with?

A. He is resident auditor under my jurisdiction.

Q. And in what city?

A. Baltimore.

Q. Have you a copy of his report?

A. Yes, sir; I have the original report on file in my office.

Q. Have you a copy here?

A. You have it, Exhibit 3.

Q. Exhibit 3 is a copy of his report?

A. Yes.

38 Q. Is that the complete report?

A. The complete report; yes, sir.

Q. Now, Mr. Brandt, according to your figures, what is the net claim of the Emergency Fleet Corporation against this estate, leaving aside the question of priority a minute?

A. I don't know whether I am in a position to answer that or not.

Q. Can you answer it?

A. I am not making this claim.

Mr. GIBBONS. He is just here testifying as to the figures in the books.

Mr. ROSE. I want to know whether, from those figures, he can tell me what the net amount of the Emergency Fleet Corporation's claim is.

The WITNESS. Not from the figures that I have before me.

Q. Well, what figures can you get it from; what do your figures show; do they show simply the gross total payments made by the Shipping Board?

A. My figures show the actual moneys paid.

Q. In other words, only debits of the Eastern Shore Shipbuilding Corporation?

A. Yes; I am not dealing with physical progress on the boats or anything of that nature.

Q. Your figures don't show any credits?

A. No; unfortunately they don't; it was not customary for the Eastern Shore Shipbuilding Corporation to pay anything.

Q. Well, you paid \$563,000 altogether?

A. \$563,179.37.

Q. You don't claim that much?

A. Mr. Rose, I am not claiming anything; I didn't come here to claim anything.

39 Q. I am trying to find out what your claim is; you gave me figures of \$563,000; now I am trying to get at it?

A. Now, that is all Mr. Gibbons asked me to tell you, an approximation of how much we paid you.

Mr. ROSE. All right; I withdraw any question, then.

Q. Mr. Brandt, have you seen this copy of the petition filed by the Emergency Fleet Corporation, purporting to give the details of its claim?

A. No, sir; I can not say as I have.

Q. You have no personal knowledge as to the value of the uncompleted hulls at the time the Emergency Fleet Corporation took possession of them?

A. No, sir; I don't know anything about that; you mean the physical value?

Q. You are not attempting to make any appraisal in your testimony?

A. No, sir.

Q. And no such appraisal was included in the figures which you have given me?

A. No, sir.

Mr. ROSE. That is all.

Redirect examination by Mr. GIBBONS.

Q. Mr. Brandt, there were some additional amounts paid out, weren't there, over and above what is shown here on these statements for materials and so forth; have you any figures on your books—

Mr. ROSE. Will you specify a little more in detail, Mr. Gibbons?

Mr. GIBBONS. Yes.

40 Q. In addition to the figures which you have given of the outlay on account of this contract, have any other sums been spent by the Fleet Corporation in connection with these boats?

Mr. ROSE. Objected to unless the question is put in more detailed form, and unless the nature of the payment is specified.

Mr. GIBBONS. That is what I am asking the witness for.

Mr. ROSE. May I ask a question, Mr. Gibbons?

Mr. GIBBONS. Yes. I will give you that in detail.

Mr. ROSE. You are not attempting anything outside of the figures in your petition now, are you?

Mr. GIBBONS. Yes, we are going to make a request for a small additional amount there. What is that amount there?

The WITNESS. \$5,574.44.

Mr. ROSE. I withdraw the objection.

Q. Now, I will ask you that question again, what payments you made?

A. Our accounts receivable ledger shows that Eastern Shore Shipbuilding Corporation is indebted to the United States Shipping Board Emergency Fleet Corporation, in the amount of \$5,574.44.

Q. For what?

A. For insurance and some miscellaneous material which was furnished them.

Q. Have you a copy of the items there?

A. I haven't the details there, I furnished Mr. Wingo with copies of all the invoices; there were seven invoices all delivered; it was principally insurance and some material.

41 Q. That is not included in this statement which you gave?

A. No, sir.

Mr. ROSE. Those figures can all be checked up?

Mr. GIBBONS. Oh, yes.

Mr. ROSE. That is all.

Mr. GIBBONS. I think, for the information of the Referee, I will offer one of these statements in evidence here. I offer in evidence sheets marked Exhibits 1 to 5, headed "Middle Atlantic District, Eastern Shore Shipbuilding Corporation, contract No. 460."

Mr. ROSE. I object to the admission of those papers in evidence in the absence of the original books and records, which are the best evidence, and in the absence of the testimony of the persons actually keeping those records, the objection being made, however, subject to withdrawal if the entries contained in these papers are verified by the Trustee's representatives at some convenient time. They may be marked in evidence subject to this objection.

(Papers referred to received in evidence and marked, "Claimant's Exhibit A, April 1, 1920.")

Sworn to before me this day of April, 1920.

* * * * * *

42 FRANK J. BRANDT, recalled:

Cross-examination by Mr. ROSE (continued):

Q. You are the district auditor for the United States Shipping Board—

A. Emergency Fleet Corporation.

Q. At Baltimore?

A. Yes, sir.

Q. You are familiar with the reports made by the Eastern Shore Shipbuilding Corporation upon which certain progress payments were made under its contract with the Fleet Corporation?

A. Yes, sir.

Q. I now show you a report attached to a voucher covering progress payment D, on Emergency Fleet Corporation hull No. 2497, voucher No. G-91, the G-91 represents the district office, now Mr. Brandt, in the course of the transactions between the Eastern Shore and the Emergency Fleet Corporation, was it not the practice for the Eastern Shore Shipbuilding Corporation to prepare these reports, upon which progress payments were made, and that these re-

ports would have to be approved by your resident inspector and resident auditor before any payments were made?

A. Yes.

Q. And are you familiar with the signatures of Mr. Insley, at one time resident inspector, and Mr. Campbell, at one time resident auditor?

A. Yes, sir.

Q. And these signatures affixed to the report of the Eastern Shore Shipbuilding Corporation, dated March 8, 1919, on hull No. 2497, which are attached to your voucher file No. G-91, the signatures of Messrs. Insley and Campbell?

A. To the best of my knowledge, yes, sir.

Q. In other words, according to the practice of the Emergency Fleet Corporation, would not those signatures indicate that this report and all similar reports had been approved by the Emergency Fleet Corporation and accepted as correct?

A. No, sir.

Q. Why were these signatures put there?

A. Put there on the part of the resident auditor to show that the figures as produced there are correct, that is, the calculations.

Q. That is, the calculations are correct?

A. Yes, sir.

Q. And these signatures could not be affixed until the correctness of the calculation had been confirmed by the parties signing these reports on behalf of the Emergency Fleet Corporation?

A. I don't think it was ever necessary for an inspector to sign as to correctness of figures, I don't think—

Q. You just told me, Mr. Brandt, that these signatures were not affixed by your representatives until the calculations had been found to be correct; is that correct or not correct?

A. Only the calculations so made found to be correct, they didn't include the approval on the part of the Emergency Fleet Corporation; a resident auditor has no authority to approve anything.

Q. What was the object of the resident inspector and auditor signing these reports before transmitting them to the Emergency Fleet Corporation?

A. If you will let me read from the entire report, I can answer your question in great detail.

Q. We don't need an answer in great detail—

Mr. GIBBONS. Well, that is the only way to get it.

Q. Just give us the reason or the object or course which those transactions took.

A. These reports are attached to the vouchers for the purpose of justifying a payment in accordance with the contract.

If you will read the contract you will see that it provides for the original payment, or the second payment is a keel-laying payment, and it provides when the keel is laid, or its equivalent in work done, it does not necessarily mean that when you get further along in the boat that your frames would have to be up, if it is a frame pay-

ment; that boat is divided into ten parts, each one of those payments are equal, with the exception of the first payment, as near as I can remember, not having the contract before me. I will read from the contract. Take this payment here, if you care to, which is the D payment. I think I said payment D "10% of the contract price on each vessel when the center and sister keelsons to said vessel are in place, cant frames erected, and steam and stem posts up, or its equivalent in work done."

Q. Let me ask you, Mr. Brandt, isn't it a fact that no progress payment would be made until these reports, a sample of which I have just shown you, had been examined by the Emergency Fleet Corporation, and until its own representative at the shipyard passed it along with their O. K.?

A. That is true. It must be borne in mind that the inspector was not under the district auditor or district comptroller.

Q. But the representative at your—

A. The resident auditor—

Q. The resident auditor is a representative of the Emergency Fleet Corporation?

A. Yes.

Q. And it is one of the officers who attached his signature to those reports before the Fleet Corporation made any progress payment under its contract; that is correct is it?

A. Yes; but I might qualify that. Even though he attached his signature to it, and the district office did not consider that the
45 payment should be made, the fact that he had attached his signature would not cause us to make the payment unless we saw fit to do it.

Q. Do you mean to say that payment would be made whether or not these reports were correct; did you take any pains to find out whether or not those reports were correct?

A. I don't mean to say that; I say this, that the fact that a resident auditor attaches his signature to a voucher does not make it incumbent upon the Emergency Fleet Corporation to make the payment. You are trying to—

Q. I didn't ask you that, Mr. Brandt; the only thing I want you to cover is: Did the Emergency Fleet at any time make any payments under contract before it had examined and approved the report made by its own representatives at the plant of the bankrupt, this bankrupt or any other concern with which it had a contract?

A. The Emergency Fleet Corporation has made payment, and every payment that ever we made is subject to further audit, but none of these payments that we made are in any case closed, because we had a right to go back at any time and make a further audit.

Mr. ROSE. If the court please, I move to strike out the answer to the question as not responsive.

Mr. GIBBONS. Ask the stenographer to read the question; I think it is responsive.

Mr. ROSE. I ask the stenographer to read the question and answer.
(Record repeated by stenographer.)

The WITNESS. I will add further that we have been——

Mr. ROSE. Just a minute.

The REFEREE. You move to strike it out?

Mr. ROSE. Yes, sir.

46 The REFEREE. I will let it stand.

(Exception noted to Mr. Rose.)

The REFEREE. I don't think the last part is responsive to your question, and expressing the opinion of the witness, so that I shouldn't take much notice of it unless it was borne out by a little more of the case.

Mr. ROSE. Does your honor rule that that answer is responsive and deny my motion?

The REFEREE. No; I don't think it is; but I will let it stand.

Mr. ROSE. All right.

The REFEREE. That is, the last part of the answer.

Q. But it is correct to say, at least, is it not, Mr. Brandt, that your representatives at the shipyard of this bankrupt have to confirm the calculations contained in the reports submitted to them, before they would send them and pass them along to the Fleet Corporation's executive offices?

A. What do you mean by "confirm"?

Q. Would these calculations be checked up before the reports would be countersigned by your representatives?

A. These were figures that were presented by the Eastern Shore Shipbuilding Corporation.

Q. Well, did your resident inspector or resident auditor simply sign this when it was presented to him without trying to find out how correct it was, or how incorrect it was; is that the practice?

A. No; it is not the practice.

Q. What would they do before they signed these?

47 Mr. GIBBONS. That is what he was trying to explain to you before and you said it was not responsive.

The REFEREE. Oh, no; he said they had the right to go back at any time and review those.

A. My answer to the question before that was that they would examine the figures as presented to them by the contractor, the Eastern Shore Shipbuilding Corporation.

Mr. ROSE. I move to strike out the answer as not being responsive to the question.

The REFEREE. What is the question?

Q. (Question repeated by stenographer.)

The REFEREE. I don't see why that is not an answer to your question.

Mr. ROSE. It is an answer to the previous question. I withdraw my objection. Will you read that answer?

(Answer repeated by stenographer.)

Q. What do you mean by examine the figures?

A. Such figures and records as the Eastern Shore Shipbuilding Corporation produced for their examination.

Q. When you say they examined the records, Mr. Brandt, what do you mean by examined, what did those examinations consist of?

A. The Eastern Shore——

Q. Would they simply look at the books?

A. I don't know whether they looked at the books or not, I wasn't down there.

48 Q. Tell me what those examinations of your representatives consisted of?

A. As I know the procedure in this case, the Eastern Shore Shipbuilding Corporation prepared these figures and submitted them to the emergency fleet for the purpose of influencing the Emergency Fleet Corporation to furnish them further moneys in the nature of a progress payment, and in submitting these figures they submitted in support of it certain records which purported to be the amount spent for labor, material, overhead, and cash paid on machinery. Added to that is a figure representing an inventory and a bond that the bankrupt furnished the Emergency Fleet Corporation for the purpose of influencing those payments.

Q. Now, Mr. Brandt, are these facts which you gave me based on your personal knowledge?

A. I told you I had never been at the plant and they are facts represented to me by other people.

Mr. ROSE. Now, if the court pleases, I move to strike out the entire testimony——

The REFEREE. Now, why did you ask him, he said he wasn't there, and you asked this question.

Mr. GIBBONS. If your honor please, he is the district auditor and is the responsible head for all of these figures.

Mr. ROSE. These questions were asked, if the court please, because Mr. Brandt has testified that he is the district auditor. As district auditor he has already testified in this proceeding that his duties, partly at least, were to supervise and to pass on all the work of his subordinates. Now, if these were subordinates of the Emer-

49 gency Fleet Corporation, and they were responsible directly to the district auditor, Mr. Brandt, ought to have some personal knowledge of the question. It is for that reason I have been pursuing this examination.

The REFEREE. If he don't know, then you have no right to ask him.

Mr. ROSE. If he don't, then his testimony is not competent.

* * * * *

Mr. GIBBONS. I want to offer what I offered a good while ago, and that is the Executive orders of the President of the United States.

The REFEREE. How about the acts of Congress, is that supposed to be before the court?

Mr. GIBBONS. Yes; and those acts are referred to specifically in these orders of the President, under authority of which he issued these orders.

Mr. ROSE. As far as those Executive orders are concerned, I don't object to them as proof of the issuance of executive orders, but I do object to them on the ground that they are incompetent, irrelevant and immaterial to show that the Emergency Fleet Corporation is for all purposes an agent or representative or department of the United States Government.

Mr. GIBBONS. They speak for themselves.

The REFEREE. Well, if they are competent for any purpose they can not be rejected.

Mr. ROSE. Well, they speak for themselves, I suppose your honor can admit them for what they are worth.

50 The REFEREE. Well, your objections are that they are irrelevant and incompetent; now, if they are competent for any purpose they can not be rejected as on that account, and if they are relevant, of course, they can not be rejected on that account.

Mr. ROSE. Mr. Gibbons hasn't stated for what they are offered.

Mr. GIBBONS. I think I did. I offered these orders to show the power vested in the Fleet Corporation, which was the power, as the order sets forth, received by the President from Congress for a shipbuilding program to carry on the war.

The REFEREE. I will admit those orders.

Mr. ROSE. I note my exception.

Mr. GIBBONS. I will ask the court to take judicial notice of the various acts referred to in these various orders.

The REFEREE. I suppose I am bound to do that.

(Orders referred to, five in number, received in evidence and marked, "Claimant's Exhibit 1, May 27, 1920.")

(Discussion between counsel and the referee.)

The REFEREE. The counsel for the trustee of the Eastern Shore Shipbuilding Corporation stipulates that the certificates of stock of the United States Shipping Board, Emergency Fleet Corporation, which are stated to be in the custody of the United States Treasurer, may be shown by the affidavit of such custodian, such

51 affidavit to state the number of certificates, the date of the certificates, and in whose name the certificates are issued.

What else is there you want?

Mr. ROSE. And in whose name the certificates now stand.

Mr. GIBBONS. That would apply to whoever may have custody of them?

The REFEREE. Yes.

Mr. ROSE. Is there any time fixed for the submission of that affidavit, your honor?

The REFEREE. Such affidavit to be submitted to the counsel for the trustee of the Eastern Shore Shipbuilding Corporation before the same is offered in evidence here.

Mr. ROSE. There are some further allegations in the petition which have not been proven.

Mr. GIBBONS. I have to put in some further evidence.

The REFEREE. And you may want to put in something when you come to look over the testimony. Now, you say there are some allegations unproved?

Mr. ROSE. Yes; I want to call your honor's attention to some paragraphs in the Emergency Fleet petition, for which no proof appears, particularly paragraphs 7, 8, and 12.

The REFEREE. Now, take up No. 7.

(Allegation seven read by Mr. Rose.)

The REFEREE. Well, that is an important allegation.

Mr. GIBBONS. Well, I thought that was covered by Mr. Brandt's testimony, and in the statement offered in evidence at the last hearing. That has been ascertained since the petition was drawn up.

Mr. ROSE. Has that been put in evidence?

Mr. GIBBONS. Yes; at the first hearing.

52 Mr. ROSE. Is that all in evidence now, Mr. Gibbons?

Mr. GIBBONS. That is on this. I offer this in evidence as supplemental to the first sheet of Exhibit E, which was April 1, 1920, which consisted of five pages.

(Paper referred to received in evidence, and marked "Claimant's Exhibit 2, May 27, 1920.")

Mr. ROSE. Now, paragraph eighth of the petition [reads paragraph].

Mr. GIBBONS. I think that is included in this Exhibit A of to-day.

The REFEREE. Well, is that anything more than a statement of your claim? Now, that may be a list of the material you claim, but that would not prove your claim. You would have to have something more than that to prove your claim.

Mr. GIBBONS. I thought, if the referee pleases, that in this paper, which has been offered in evidence, Exhibit B, it simply refers to an inventory shown on sheet attached—as per the books—but the attached sheet refers to the books and does not give a detailed statement of the inventory, therefore, I ask, please, to produce evidence as to that allegation.

The REFEREE. Yes; you will have to connect the company somehow with that.

Mr. ROSE. If your honor please, I am afraid that Mr. Gibbons has not yet made clear what the purpose of this allegation is. Does the Emergency Fleet claim these amounts in addition to the amounts already set out or is it inclusive?

Mr. GIBBONS. You mean is this—

53 Mr. ROSE. Is this \$260,000 a part of the entire claim?

Mr. GIBBONS. Yes; that is a part of the claim, I understand that to be the case.

Mr. ROSE. Well, then, I think I am justified in asking your honor whether the Emergency Fleet Corporation proposes to prove its claim on the theory that it had title to these materials, or whether it merely

proposes to claim priority on the ground that it represents the United States, or both. I think I am entitled to know which.

The REFEREE. Well, in the first place, is that claim included in your claim of \$328,000?

Mr. GIBBONS. I was just looking at this petition; this is a petition which I did not draw. The conclusion of this petition is for an order allowing the petitioner to take possession of these materials to that amount [reads petition]. That is practically all this claim of \$328,000.

Mr. ROSE. Is your petition merely for the establishment of your claim for \$328,000, or have you other claims in addition thereto?

Mr. GIBBONS. To establish our priority and that is the amount of the claim; there are some immaterial allegations.

The REFEREE. Well, he wants to know whether the allegation in the eighth paragraph is a claim in addition to your claim for \$328,000.

Mr. GIBBONS. No; I think——

The REFEREE. It seems to proceed on a different cause of action.

Mr. GIBBONS. No; of course, if we could have gotten materials of that value, that would have been deducted from the other, that is my understanding.

Mr. ROSE. Now, if the court pleases, I think that the trustee is entitled to a ruling from the referee directing the petitioner to state the theory of its cause of action or which theory it proceeds on. I mean that the petitioner should be compelled to elect between its theory that it had title to the materials mentioned in the petition or its theory that merely as a representative of the United States Government it is entitled to priority.

Mr. GIBBONS. Well, it is both.

Mr. ROSE. If it is both, then I say to your honor there is no proof of the title to these materials.

The REFEREE. Well, it is not both, as I understand it; they claim that they are acting for and represent, and are one of the agents of the United States Government, and that any claim they have in this proceeding they claim as such, that as an agent of the United States Government, that the United States Government is entitled to these things.

Mr. ROSE. Well, that being so——

The REFEREE. That is what they undertake to say, as I understand it.

Mr. GIBBONS. That is it exactly, and our amount, as we set forth in the petition is \$341,017.72 and was reduced to \$328,017.73, and that was to be less the value of such supplies and materials as may have been delivered to us under the prayer above made, which had to do with this material belonging to us under the inventory value of \$158,000.

The REFEREE. In other words, the \$328,000 does include the \$158,000?

Mr. GIBBONS. If we get any of it; yes.

The REFEREE. No; whether you got it or not. If you get it, it should be deducted, and if you don't get any of it, your claim is \$328,000.

Mr. GIBBONS. Exactly; that is what is set forth in the end of our petition.

Mr. ROSE. In other words, this amount is included in the \$328,000?

Mr. GIBBONS. Yes.

Mr. ROSE. Now, I call your honor's attention to paragraph 11 of the petition reading as follows (reads paragraph). I ask your honor to rule that the burden of proof is on the petitioner to establish that allegation.

The REFEREE. How is that going to help you if it is subject to the State lien law?

Mr. ROSE. Just this, we propose to contend that the Emergency Fleet Corporation, even if a representative of the United States Government, has no legal authority to insert in this contract any such clause vesting in it title to materials as is included in the present contract, and that such a clause, even if legal, constitutes a contract no more than an ordinary chattel mortgage, which must be recorded under the State law of Maryland. Now, if the petitioner contends that it is not subject to this State registry law, on the theory that it is the United States Government, then it is
56 for the Government to prove that allegation; the burden should be on them.

The REFEREE. Well, that is a matter of law, isn't it?

Mr. GIBBONS. That is a matter of law.

The REFEREE. It is in the domain of general jurisprudence, isn't it?

Mr. ROSE. If that is the case, then this allegation is immaterial.

The REFEREE. They put in the acts of Congress under which their company was incorporated, and the powers exercised by the President pursuant to those statutes relative to the operations of this company, and they say that makes it—that it is a Government agency of the United States and has the same rights as if it was the United States, and the other allegation which you have particularly called attention to is practically to the effect that all their property, being the property of the United States, is not subject to certain lien laws of the State. Whether that is so or not, I don't know; I suppose the Supreme Court has decided it in a good many cases.

Mr. ROSE. Well the point of my statement is this your honor: Proving the question of whether or not the United States is subject to State registry laws may well be a matter of law, but in view of this clause in the contract, and in view of the fact that there is no proof of the title to any of these materials, it does become important to determine the importance of the applications of these State statutes. If the United States has shown title to these materials,
57 then it would be entirely a question of law, but in the absence of that proof there is a question of fact as well as of law, and that proof has not been adduced as yet.

Mr. GIBBONS. The original contract provides that these materials that the vessel is constructed of should belong to the United States of America, and the materials to the owner, and should not be subject to the State lien laws.

The REFEREE. You claim that nobody has a right to make that contract?

Mr. ROSE. I claim that the Emergency Fleet has no right to make that contract.

The REFEREE. The United States might make it.

Mr. ROSE. The sovereign Government might make it; I don't concede that—I don't concede that the Emergency Fleet Corporation is the United States.

The REFEREE. Now, I understood they stated they reserved the right to prove that; isn't that so?

Mr. GIBBONS. Yes.

The REFEREE. I suppose the burden of proof is on you, Mr. Gibbons, to show the title, it being in the possession of the Eastern Shore Shipbuilding Company, I think the presumption would be that the property belonged to them; that the title was in them, and if you want to show it is yours you would have to show it.

Mr. GIBBONS. Except that the principal work done down there was work for us and the materials brought down there was bought with our funds. As I say, it is gone, and if it is out of there we can't get it, and we will let the amount stand at \$328,000.

The REFEREE. Well, that raises a question; that assumes that the \$158,000 of property is yours.

Mr. GIBBONS. What I mean is, none of it is there any more—

The REFEREE. Now, I think the burden of proof is on you to show that.

Mr. ROSE. Do I understand your honor to hold the petitioner must prove the allegation in paragraph No. 8, the one that we have been discussing, that the burden of proof is on the petitioner to establish the facts contained in that paragraph with reference to the ownership of these materials?

The REFEREE. It seems to me that that is so.

Mr. ROSE. Now, I offer in evidence a copy of the certificate of incorporation of the Emergency Fleet Corporation for the purpose of showing the nature of its organization.

The REFEREE. You offer it in evidence?

Mr. ROSE. Yes, sir. Have you any objection to my offering a copy, Mr. Gibbons, of the certificate of incorporation; I could not get a certified copy.

Mr. GIBBONS. No; I have no objection.

(Paper referred to received in evidence and marked "Trustee's Exhibit G, May 27, 1920.")

Mr. ROSE. Also a copy of the contract between the Emergency Fleet Corporation and the bankrupt.

(Paper referred to received in evidence and marked "Trustee's Exhibit H, May 27, 1920.")

59 Mr. ROSE. There is just one further matter to be disposed of, your honor. I now move to dismiss the petition of the Emergency Fleet Corporation upon the ground that the entire question of priority of its claim has already been decided in the equity proceedings in the District Court of Maryland, against the Eastern Shore Shipbuilding Corporation. I offer in evidence a certified copy of the decision of Judge Rose on the petition of the Emergency Fleet Corporation, ruling on the exact question now in issue, and I ask your honor—I move to dismiss upon the ground that the question is now res adjudicata.

The REFEREE. Well, now, the opinion is not a final order or a judgment, and to constitute a res adjudicata you have to have an order or final judgment.

Mr. ROSE. Well, the decision may be put in evidence——

The REFEREE. Well, you need not put it in evidence, you can cite it in your brief.

Mr. ROSE. Will your honor make a ruling on the record, that your honor has no jurisdiction to enter an order on this decision on my motion?

The REFEREE. Yes.

Mr. ROSE. Shall I put a formal motion on the records, sir?

The REFEREE. Yes; you make a formal motion that I——

Mr. ROSE. That you enter a final order on the decision of Judge Rose in the equity proceedings, dismissing the petition of the Emergency Fleet Corporation.

60 The REFEREE. I don't think I have power to make such an order, and I therefore deny the motion.

Mr. ROSE. I note an exception. There is nothing else, so far as I can see, this afternoon, your honor.

* * * * *

JOHN J. FLAHERTY, called as a witness on behalf of the claimant, having been duly sworn, testified as follows:

By the REFEREE:

Q. What is your name?

A. Mr. Flaherty.

Q. What is your first name?

A. John J.

Q. Where do you live?

A. I live in Virginia, Alexandria County.

Q. What is your occupation?

A. I am secretary of the United States Shipping Board Emergency Fleet Corporation.

Q. Where is your headquarters?

A. Washington, D. C.

Direct examination by Mr. GIBBONS:

Q. Mr. Flaherty, you were requested to bring here the stock book of the United States Shipping Board Emergency Fleet Corporation, have you that with you?

A. Yes, sir.

Q. Will you produce it, please?

A. Yes, sir.

61 Mr. GIBBONS. At the last meeting it was proposed, if your honor recalls, to produce an affidavit regarding the holding of this stock, but it was thought better to bring in the stock book itself and show just how these shares were held. Of course, we don't want to offer the book in evidence, because the secretary wants to take it away with him.

The REFEREE. How is that material?

Mr. GIBBONS. To show how the stock of the corporation is held, on behalf of the United States except for the qualifying shares of the trustees.

The REFEREE. To show that the stock is held by the United States.

Mr. GIBBONS. To show that the stock is held for the benefit of the United States.

Q. Mr. Flaherty, referring to this stock book, can you state how the shares of stock—in the first place, how many shares of stock are there in the corporation?

A. There are five hundred thousand.

Q. The capital stock is how much?

A. Fifty million dollars.

Q. That is, each share of stock is worth a thousand dollars?

A. One hundred dollars.

Q. Will you tell us, by reference to the book, how these shares were held, the original distribution of the shares?

A. Why, are you referring now to all of the—I will have to refer to the book now to show you how the shares of stock were issued at various times.

62 Mr. GIBBONS. Yes, that is, we want to go through with the holding by all the separate trustees, but the idea is this, to account for the five hundred thousand shares at any one definite time, at the beginning of the corporation.

Mr. ROSE. I should think that all we wanted is the present owner of the stock and how much stock is outstanding.

The REFEREE. They proved a claim here, didn't they? They filed a claim?

Mr. ROSE. Who did?

The REFEREE. This corporation.

Mr. ROSE. Yes, the Emergency Fleet Corporation.

The REFEREE. Who were the owners at that time? That would be the date and the date of the bankruptcy.

Mr. GIBBONS. Well, this testimony will show that the owners are substantially the same all along, except that the trustees of the corporation have changed.

The REFEREE. The two dates that are important is, who owned the shares at the date of the bankruptcy and who owned the shares at the date they proved their claim.

Mr. ROSE. I don't remember the exact date of the bankruptcy, your honor, I think it was about the 15th to the 20th of March, 1919, and the date of their petition is about September 15th, 1919.

The REFEREE. The date of filing their claim?

Mr. ROSE. Yes, sir; I am not certain of the dates, though.

By the REFEREE:

Q. Where was this corporation incorporated?

A. In the District of Columbia.

63 Q. What is the date of the incorporation?

A. April 17, 1917.

Mr. ROSE. The certificate of incorporation is already in evidence, your honor.

By Mr. GIBBONS:

Q. Well, at any time, Mr. Flaherty, at any time during the life of the corporation since it was chartered, how many shares have been held by individuals?

Mr. ROSE. I object to that question unless dates are specified.

Mr. GIBBONS. I said at any time since the corporation was chartered.

The REFEREE. Well, get the date and then you will have what you want. Find out when the petition in bankruptcy was filed and find out when you proved your claim and then any other dates—

Mr. ROSE. March 20, 1919, was the bankruptcy.

Q. Now, on March 20, 1919, Mr. Flaherty, how were these shares of stock held?

A. On that date all the stock of the corporation was owned by the Shipping Board and held by it for and in behalf of the United States with the exception of stock that was issued to the trustees of the corporation to qualify them as trustees.

Mr. ROSE. If your honor please, I move to strike out the statement that the stock was held on behalf of the United States on
40 the ground that the certificates themselves are the best evidence.

Mr. GIBBONS. Well, that is what we want to refer to and see how the certificates were made out.

The REFEREE. Well, put the question in that way. Look at the stock book and tell us on the date of the 20th of March, 1919, in whose names of certificates of stock were held; take up the first certificate, how does that read?

Mr. GIBBONS. That was not that date.

Mr. ROSE. March 19; March 20th.

The WITNESS. The nearest date I have to March, 1919, is a share of stock that was issued on June 16, 1919, to the then—

The REFEREE. That is the wrong side of the date.

Mr. GIBBONS. Take the one previous to that.

The REFEREE. Take it previous to March, 1919, as near as you can get the date.

The WITNESS. On February 13, 1919, one share of stock was issued to Mr. R. B. Stevens to qualify him as a trustee of the corporation.

Q. What is the number of that certificate?

A. That was certificate No. 20 and that was one of the shares which was purchased by the Shipping Board for and on behalf of the United States.

Q. Now, who were the holders at that time?

A. On January 28, 1919, certificate No. 19 was issued to Mr. Charles Piez—

Q. Is he one of the trustees?

A. Mr. Piez was one of the trustees.

65 By the REFEREE:

Q. And what was the amount of his stock?

A. One share.

Q. Does that stand in his name?

A. Yes, sir; it did.

By Mr. ROSE:

Q. It did?

A. It did.

Mr. GIBBONS. Yes; at that time.

By Mr. GIBBONS:

Q. When these shares were issued, these two shares you have referred to, was there any endorsement made on the stock at that time?

A. Yes; they were assigned on the back in blank to the United States Shipping Board.

By the REFEREE:

Q. That is the corporation?

A. No; United States Shipping Board.

Q. Was the corporation, wasn't it?

A. No, sir; the United States Shipping Board held—

The REFEREE. Who is making the claim here?

Mr. ROSE. The United States Shipping Board Emergency Fleet Corporation.

The REFEREE. That is a different thing, is it?

Mr. GIBBONS. That is separate from the United States Shipping Board.

66 By Mr. GIBBONS:

Q. When the other stock was issued to Mr. Stevens, how was that endorsed?

A. That was endorsed in blank.

Q. And as these different shares were issued to the trustees were they all endorsed in this way?

A. Yes, sir.

Q. Who were the holders?

Mr. ROSE. At what time?

Mr. GIBBONS. The same time; we are referring to this same date.

A. On November 7, 1918, one share of stock, certificate No. 18, was issued to John H. Rosseter; that was also endorsed in blank.

Q. These last two that you have referred to, the last two shares, appear in the stock book here to be marked cancelled; what is that?

A. Well, that is when the trustee resigned, the stock which was issued to them is cancelled.

Q. And then the successor receives a new share; is that the idea?

A. Yes, sir.

Q. Now, who were the other ones?

A. On August 22, 1918, certificate No. 17, one share of stock was issued to Edward F. Carry.

Q. Was he at that time a trustee?

A. Yes, sir.

Q. Is that also endorsed in blank?

A. That is also endorsed in blank.

Q. And at the time of the cancellation what was done with that certificate?

A. It reverts back to the Shipping Board—United States Shipping Board.

Q. The name being filled in on the endorsement; is that the idea?

67 A. Yes, sir; on July 10, 1918, certificate No. 16 for one share of stock was issued to Stephen N. Bourne to qualify him as a trustee.

Q. Has that share been cancelled?

A. That share has been cancelled.

Q. What does it appear on the endorsement?

A. Assigned and transferred to the United States Shipping Board. On May 2, 1918, certificate No. 15 for one share of stock was issued to Charles Dey to qualify him as a trustee of the Emergency Fleet Corporation.

Q. Is there any endorsement on that certificate?

A. That is endorsed and assigned to the United States Shipping Board, this share has also been cancelled; on November 15, 1917, certificate No. 14 for one share of stock was issued to Charles Piez to qualify him as a trustee; that certificate was cancelled and bears an endorsement assigning and transferring it to the United States Shipping Board. On October 29, 1917, certificate No. 13 for one share of stock was issued to Charles R. Page to qualify him as a trustee; that certificate was cancelled and bears an endorsement transferring and assigning it to the United States Shipping Board. On September 8, 1917, certificate No. 12 for one share of stock was issued to Bainbridge Colby to qualify him as a trustee; that certificate has since been cancelled and at the time of its issuance was endorsed in blank by Mr. Colby and assigned to the United States Shipping Board. On November 16, 1917, certificate No. 11 for 215,000 shares of stock was issued to the United States Shipping Board on behalf of the United States; the value of that stock was \$21,500,000.

68 Mr. ROSE. I move to strike out that part referring to the value of the stock as not bearing at all in the cast, it is a question of ownership.

The REFEREE. Well, the fact value or par value—

Mr. ROSE. Par value, it is immaterial.

By the REFEREE:

Q. What certificate is that?

A. Certificate No. 11 for 215,000 shares.

Q. To whom does it go?

A. To the United States Shipping Board on behalf of the United States.

Mr. GIBBONS. The certificates themselves indicate the capital stock and show what the value or par value of each share is, so that it would show that that was the amount anyway.

The REFEREE. It shows that that was the par value.

By Mr. GIBBONS:

Q. That is not cancelled is it, that share?

A. No; it has not been cancelled. Shall I continue?

Q. Yes.

A. On September 14, 1917, certificate No. 10 for 60,000 shares was issued to the United States Shipping Board on behalf of the United States and the par value of that was six million dollars. On August 24, 1917, certificate No. 9 for 30,000 shares was issued to the United States Shipping Board on behalf of the United States and the par value was three million dollars.

Q. These shares to the Shipping Board of the United States, none of them were cancelled so far as you indicate?

69 A. No. On August 2, 1917, certificate No. 8 for 40,000 was issued to the United States Shipping Board on behalf of the United States. The par value of that was four million dollars. On July 28, 1917, certificate No. 7 for 154,993 shares was issued to the United States Shipping Board on behalf of the United States, the par value \$15,499,300.

By the REFEREE:

Q. What is the date of those certificates, all prior to the bankruptcy?

A. All prior to March, 1919. On July 28, 1917, certificate No. 60, for one share of stock, was issued to E. P. Bertholf to qualify Mr. Bertholf as a trustee.

By Mr. GIBBONS:

Q. Has that been cancelled, that share of stock?

A. That has been cancelled.

Q. At the time was it assigned?

A. Assigned to the United States Shipping Board. On July 28, 1917, certificate No. 5, for one share of stock, was issued to F. A. Eustis to qualify Mr. Eustis as a trustee of the corporation; that certificate was cancelled and at the time of its issuance was assigned to

the United States Shipping Board. July 28, 1917, certificate No. 4, for one share of stock, issued to Washington L. Capps, to qualify him as a trustee. That certificate was assigned at the time of its issuance to the United States Shipping Board and was subsequently cancelled when Mr. Capps resigned as a trustee. On July 28, 1917, certificate No. 3, for one share of stock, was issued to Raymond B.

Stephens, to qualify him as a trustee of the corporation; that
70 certificate was assigned to the United States Shipping Board and was subsequently cancelled. On July 28, 1917, certificate No. 2, for one share of stock, was issued to John A. Donald, to qualify him as a trustee. Mr. Donald has endorsed that certificate in blank and it has not been cancelled, Mr. Donald still being a trustee of the corporation. On July 28, 1917, one share of stock was issued to Edward N. Hurley, to qualify him as a trustee; that certificate was cancelled at the time of Mr. Hurley's resignation and has been endorsed in blank by Mr. Hurley.

Q. Prior to the date of the bankruptcy, Mr. Flaherty, were there any shares of stock issued except to the trustees of the United States Shipping Board Emergency Fleet Corporation, or to the United States Shipping Board on behalf of the United States?

A. No, sir.

Q. Since the date of the bankruptcy have any shares at any time been issued to any private individuals?

A. Yes; they have been issued to those individuals who had qualified as trustees of the corporation.

Q. Have they been issued to anybody outside of trustees of the corporation as qualifying shares?

A. No, sir.

Q. This stock book shows the issue of all the shares of stock?

A. Yes, sir.

Q. From the time they were first issued down to date?

A. Yes, sir.

Q. At any time then, Mr. Flaherty, at the date of the bankruptcy, we will say, the stock was issued in what proportion in shares to the Shipping Board on behalf of the United States and how much to trustees?

A. Well, if at the time of the bankruptcy, which is March, 1919,
71 there were seven trustees, as required in the articles of incorporation, 499,993 shares of the stock of the corporation was or had been issued to the United States Shipping Board on behalf of the United States.

Mr. ROSE. I move to strike out the answer as not responsive and upon the ground that the certificates speak for themselves.

The REFEREE. Yes; the witness don't add anything to it by saying, "On behalf of the United States"; what do the certificates show?

Mr. GIBBONS. He is not saying that; they show that on the certificates.

The REFEREE. Read me one of the certificates.

Mr. GIBBONS. That was not put on by the witness.

The WITNESS. Certificate No. 11, 215,000 shares. Certificate of stock. Par value, \$100 each. United States Shipping Board Emergency Fleet Corporation. Capital stock, \$50,000,000. Full paid and nonassessable. Incorporated under the laws of the District of Columbia. This is to certify that United States Shipping Board, on behalf of the United States, is the registered owner of 215,000 shares of the stock of this company, transferrable only on the books of the company by the said owner, in person or by duly authorized attorney, upon surrender of this certificate properly endorsed. Witness the seal of this company and the signature of its president and treasurer this 16th day of November, A. D. 1917. Edward N. Hurley, president. R. B. Stevens, treasurer. Lester Sisler, secretary.

72 By the REFEREE:

Q. At the time of the bankruptcy, was any of this stock held by private individuals?

A. Some of it was held by the trustees of the corporation.

Q. In their names?

A. In their names; yes, sir.

Q. Were they held by any other private individuals?

A. No, sir.

By Mr. GIBBONS:

Q. According to this stock book, they were not held by any other individuals than trustees of the United States Shipping Board Emergency Fleet Corporation?

Mr. ROSE. I object to that on the ground that the certificates speak for themselves.

Mr. GIBBONS. If the court please, we have not given all of them because we did not want to go all through the book.

Mr. ROSE. You are only going up to March 20th; does that cover all the stock issued?

Mr. GIBBONS. Yes.

The REFEREE. I think I will allow it for the sake of convenience. (Exception noted to Mr. Rose.)

A. Will you repeat it, please?

Q. (Question repeated by stenographer.)

A. No, sir.

Q. In case of a vacancy in the board of trustees because of non-appointment by the President, who would hold that share that the resigning trustee had held?

73 The REFEREE. You are calling for his opinion, aren't you?

Mr. GIBBONS. No, from the stock book; it will show from the stock book.

Mr. ROSE. The stock book doesn't show it; the stock book shows merely the issuance of certain of the certificates of stock themselves.

Mr. GIBBONS. When these certificates were issued to these various trustees.

The REFEREE. Were duly delivered, you mean?

Mr. GIBBONS. They were never delivered, they remained in the stock book, that is what I am bringing out.

The REFEREE. All of them?

Mr. GIBBONS. Yes.

Q. Were any of these certificates ever issued out of this book?

A. No, sir.

The REFEREE. That applies to all of them?

Mr. GIBBONS. That applies to all of them. When they were issued the trustee to whom they were issued endorsed the certificate in blank as the witness has testified in each of these cases.

The WITNESS. Yes, sir.

Q. And when the trustee would resign, what was done with the certificate?

A. It was transferred to the United States Shipping Board.

Q. And was there any mark made on the face of the certificate that it had been held by the trustee at that time?

A. It was indicated on the face of the certificate that the certificate was cancelled.

74 Q. And that is indicated on these shares here in red ink?

A. Yes, sir.

Q. And then it would be the practice to issue a new one to the succeeding trustee?

Mr. ROSE. I object to any testimony about the practice; there is evidence of what certificates were issued, they speak for themselves.

Mr. GIBBONS. You see, we are not leaving the certificates here.

The REFEREE. Well, you can get anything out of it you choose, but you are asking him about the practice; that don't bind the other creditors.

Mr. GIBBONS. I will get at it in this way.

Q. How many certificates of stock are in this book which you have here, which have been issued, Mr. Flaherty?

A. Five hundred thousand.

Q. How many certificates?

A. All.

By the REFEREE:

Q. That is the full capital stock?

A. Yes, sir.

By Mr. GIBBONS:

Q. All the capital stock was issued?

A. Yes, sir.

Q. And how many certificates have been issued at different times?

A. Twenty-six certificates have been issued.

The REFEREE. Now, let me ask him; take those stock certificates that were issued to this, what do you call this Shipping Board?

75 Mr. ROSE. United States Shipping Board.

The WITNESS. Emergency Fleet Corporation.

The REFEREE. Emergency Fleet Corporation.

Mr. GIBBONS. That is the corporation.

The REFEREE. Is that the way?

Mr. ROSE. No; the stock certificates read as being issued to the United States Shipping Board on behalf of the United States, not to the United States Shipping Board Emergency Fleet Corporation.

The REFEREE. Are those certificates indorsed?

Mr. GIBBONS. Just look at those and see the ones issued to the Shipping Board on behalf of the United States.

The REFEREE. Are they indorsed?

The WITNESS. No; there has been no assignment.

By the REFEREE:

Q. There has been no indorsement in the case of any of those certificates?

A. No, sir.

Q. And they are to get how much?

A. \$50,000,000.

Q. Well, that includes the trustees, that includes the whole capital stock?

A. Yes, sir.

Q. And the whole capital stock is not held by this corporation, is it?

A. Well, at the present time it is all held with the exception of four certificates.

The REFEREE. Well, that is an exception.

76 By Mr. ROSE:

Q. You mean that all the stock is now held by the Shipping Board?

A. Yes.

The REFEREE. With the exception of four that stand in the name of the trustees.

Mr. ROSE. There is no proof of that, your honor, there is no proof of who owns the certificates at this time.

The REFEREE. Well, that is not necessary. He has proved how it stood at the date prior to the bankruptcy, and then it is for you to show that the situation is changed, because it would be assumed that the same condition existed at the time of the bankruptcy.

By Mr. GIBBONS:

Q. Have any of these certificates been removed from the book?

A. None of them.

Q. And these certificates that you have referred to in your testimony so far bear indorsements, do they, all of them?

Mr. ROSE. The certificates speak for themselves, your honor; I object to the witness testifying to the contents of any written document.

The REFEREE. Well, we have it right before us here; you are technically right in your objection, but it is a matter of convenience and I think it would be well for your counsel and the witness to look it over and see if that is not so.

77 Mr. ROSE. Well, I am not examining the witness just yet; it is for Mr. Gibbons to decide.

Mr. GIBBONS. I want to get from the book here all we can on the record to indicate that these shares are held by the Shipping Board and the trustees.

Mr. ROSE. That is true, but I am not conducting Mr. Gibbons' examination.

The REFEREE. The testimony now is to the effect that the stock, 500,000 shares, has been issued, and in this certificate book, with the exception of four or five trustees, in whose name a certificate was originally issued, all those shares of stock have been issued in the name of the United States Shipping Board on behalf of the United States; that is the way they stand.

Mr. GIBBONS. Yes, sir.

The REFEREE. Then, in regard to those shares which were originally issued to the trustees, I understand they endorsed them over to the same parties.

Mr. GIBBONS. Exactly.

The REFEREE. Is that it?

Mr. GIBBONS. Exactly.

The REFEREE. So there is no shares of stock that stand in the name of the trustees?

Mr. GIBBONS. No.

The REFEREE. They have been endorsed over?

Mr. GIBBONS. Exactly.

The REFEREE. So that you claim that this company, this corporation, owns the whole of the stock?

Mr. GIBBONS. Yes.

78 The REFEREE. Is the legal owner of the whole stock?

Mr. GIBBONS. Whether in its own name or by endorsement from the trustees, and that the book shows——

The REFEREE. Well, the book shows that.

Mr. GIBBONS. The book shows that none of them have ever been delivered, that these shares are all intact.

Mr. ROSE. Well, if the book shows that, why don't you offer the book in evidence?

The REFEREE. Well, he doesn't want to leave it here, they will produce it if you want it.

Mr. GIBBONS. I think counsel can agree about the situation here by looking over this.

The REFEREE. They will produce it if it is wanted, if I want to examine it or you wanted it for any legitimate purposes.

Mr. ROSE. That is all very well, your honor, but I propose to object to any evidence to these certificates on the ground that the certificates themselves show the owner to be a different corporation from the corporation which is making the claim in this proceeding.

The REFEREE. Well, that is so, but they may not be able to prove their whole case by this one witness and this one certificate book; they may show that this stock was vested in the claimant here.

Mr. ROSE. If the court please, there has been no connection shown whatever of this United States Shipping Board and this claimant, that is why I am objecting to these certificates.

Mr. GIBBONS. Well, that is shown by the Executive orders that were offered in evidence.

The REFEREE. Have you put them in evidence?

Mr. GIBBONS. The Executive orders are in evidence.

The REFEREE. When were they put in evidence?

Mr. GIBBONS. At the meeting before last or perhaps the last meeting, the last meeting, probably, and they refer to these various acts.

The REFEREE. In substance, what do they purport to show?

Mr. GIBBONS. They purport to show that at different times acts were passed by Congress vesting certain power in the President, and that he delegated those powers to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, from time to time, as those orders were issued.

(Discussion between counsel and the referee.)

The REFEREE. Well, go on, have you anything further from this witness, have you got what you want out of this witness?

Mr. GIBBONS. I think so.

The REFEREE. Then you may cross-examine.

80 Cross-examination by Mr. ROSE:

Q. Mr. Flaherty, who are now, or is now the owner of the stock of the United States Shipping Board Emergency Fleet Corporation?

A. The United States.

Q. I mean—

A. The United States Shipping Board.

Q. Of all the stock?

A. Yes; all of the stock.

Q. Is any of it held by private individuals at this time?

A. Four shares are held by trustees, there being but four trustees at this time.

By the REFEREE:

Q. And their certificates having been endorsed over?

A. Yes, sir.

Q. To the United States Shipping Board?

By Mr. ROSE:

Q. Now, take certificate No. 1, Mr. Flaherty, is that endorsed to the United States Shipping Board?

A. That is endorsed.

Q. Oh, pardon me, certificate No. 1 is canceled; certificate No. 2, standing in the name of John A. Donald, will you look at that and tell me whether that is endorsed to the United States Shipping Board?

A. It is not endorsed; no, sir.

By the REFEREE:

Q. It is not endorsed?

A. It is endorsed in blank, but not assigned.

Mr. GIBBONS. It is attached to the book; it is in the possession of the Shipping Board.

81 By Mr. ROSE:

Q. Certificate No. 20, standing in the name of R. B. Stevens, is that endorsed to the United States Shipping Board?

A. No, sir.

The REFEREE. Endorsed to them?

Mr. GIBBONS. It is endorsed.

The REFEREE. It is endorsed in blank.

Mr. ROSE. But not to the United States Shipping Board.

Q. Certificate No. 23, standing in the name of John Barton Payne, is that endorsed to the United States Shipping Board or in blank?

A. No, sir, it is not.

Q. Endorsed in blank?

A. Endorsed in blank.

Q. Certificate No. 25, standing in the name of W. S. Benson, issued March 15, 1920, for one share, is that endorsed to the United States Shipping Board?

A. It is endorsed, but in blank.

Q. Number 26, issued April 19, 1920, in the name of Martin J. Gillen—never mind that, it is endorsed to the Shipping Board. That is all, twenty-six certificates?

A. That is all.

Q. Now, Mr. Flaherty, in these cases, in the cases of the certificates which you have examined and which appear to be endorsed to the United States Shipping Board, will you read the exact wording of the transfer or assignment of that certificate or certificates?

A. (Reading:) "For value received, I hereby sell, assign, and transfer unto the United States Shipping Board, shares of the stock represented in the within certificate, and do hereby irrevocably constitute and appoint James V. Converse, to transfer the
82 said stock on the books of the within named company, with full power of substitution in the premises. Dated May 1st, 1919. Charles Piez. In presence of John J. Flaherty."

Q. Now, that endorsement is to the United States Shipping Board, and not to the United States Shipping Board Emergency Fleet Corporation, is it not?

A. Yes, sir.

Q. What was the organization of the United States Shipping Board on March 20, 1919?

A. I can't, without referring to the records, advise you whether the board, as it was then constituted—

Q. Well, was the United States Shipping Board a corporation?

A. No, it was not, it was created by an act of Congress passed in the latter part of 1916; I don't recall the date; it was organized on

January 30, 1917, at which time the President appointed five commissioners as provided for in the act.

Q. These certificates of stock concerning which you have testified, were these held by the United States Shipping Board Commissioners?

A. Not all of them, no.

Q. Who holds the stock standing in the name of the United States Shipping Board, who is the actual holder?

A. The stock issued to the United States Shipping Board is held by the chairman of the United States Shipping Board, who has power to vote.

Mr. ROSE. I move to strike out the part, "who has power to vote." The REFEREE. Let it go out.

Mr. GIBBONS. That is part of the answer, isn't it?

Mr. ROSE. No, it is not.

Q. Should the United States Shipping Board desire to transfer one of these certificates, what would be the method of its transfer?

A. A resolution—when a trustee is elected, a resolution is adopted by the United States Shipping Board directing the treasurer of the United States Shipping Board Emergency Fleet Corporation to transfer one of the shares of stock owned by it to qualify a trustee.

Mr. ROSE. That answer is not responsive to my question, your honor, I move to strike it out. I asked what would be the procedure if the United States Shipping Board were to transfer one of these certificates; I didn't ask what would happen in the case a trustee was elected, I don't know what that has to do with it.

Mr. GIBBONS. He answered the question.

The REFEREE. It seems to me that is calling for his opinion.

Q. Did you have charge of the preparation and the issuance of these certificates?

A. Some of them, yes.

Q. Well, did you have charge of the transfer of certificates?

A. Some of them, yes.

Q. Have you transferred any of the certificates of the United States Shipping Board to private individuals at any time?

A. Only to those individuals who have been elected as trustees of the corporation.

Q. Well, in those cases, how would you transfer a certificate in the manner in which you have already testified?

A. Yes.

Q. In other words, a resolution would be passed by the board?

A. A resolution would be passed by the United States Shipping Board after the election of a trustee, directing the treasurer of the corporation to transfer one of the shares of the stock held by it for and on behalf of the United States to the individual who had been elected a trustee.

Q. And what would be the form of the transfer on the certificate itself, or has been the form on previous occasions?

Mr. GIBBONS. I think we have that on the record already.

The REFEREE. I know, but you are using the book in connection with the witness's testimony, you used it in that way, you did that for convenience.

Mr. GIBBONS. Yes, but he has that already on the notes, these endorsements.

By the REFEREE:

Q. Well, you would take a new certificate and put the name in of the new trustee?

A. Yes.

Q. And you would have the old trustee endorse the old certificate, or that would have been done already?

A. When the certificate is issued it is endorsed in the blank by the trustee to whom it is issued.

By Mr. GIBBONS:

Q. To get that clear, that is done at the time it is issued?

A. Yes, sir.

By Mr. ROSE:

Q. And the old certificate is canceled?

A. Yes, sir.

85 Q. Are you familiar with the rules and regulations of the United States Shipping Board?

A. Somewhat.

Q. To your knowledge, is there any rule or regulation prohibiting the transfer of a certificate of stock owned by the United States Shipping Board to a private individual other than a trustee?

A. There is no such rule or regulation.

Q. So that it would be perfectly proper and possible for a private individual, other than a qualifying trustee, to have a certificate of stock issued to him?

The REFEREE. Well, I think that is calling for his opinion.

Mr. ROSE. I withdraw the question—that is not quite proper. That is all.

Redirect examination by Mr. GIBBONS:

Q. Who has the custody of this book?

A. I have.

Q. Have any shares of stock ever been delivered—any of these shares of stock ever been delivered that have been issued?

A. No, sir; the formality is gone through of delivering the stock to the trustee after his election, and he accepts the delivery of it in the book and returns it to me.

Q. Have any certificates ever been taken out of this book?

A. No certificates have ever been taken out.

The REFEREE. What is your claim, \$321,000?

Mr. GIBBONS. \$328,000; it has been changed by the statement which we have put in evidence; this is the statement that was offered.

86 The REFEREE. That has been put in evidence?

Mr. GIBBONS. Yes, sir.

The REFEREE. You will file that with me when you close the case?

Mr. ROSE. Just one other point with reference to this stock certificate book. May we have a stipulation on the record from Mr. Gibbons that we may examine the stock-certificate book if we think it necessary?

Mr. GIBBONS. Surely; yes, it can always be looked at down there; it is kept in Washington. It is kept in your office, isn't it?

The WITNESS. Yes; it is kept in my office.

(Discussion between counsel and the referee.)

The REFEREE. Have you gotten through with this witness?

Mr. ROSE. I am through.

The REFEREE. Have you anything further?

Mr. GIBBONS. No.

The REFEREE. Have you anything further to put in?

Mr. ROSE. No, sir.

Mr. GIBBONS. I offer in evidence a certified copy of the certificate of incorporation of the United States Shipping Board Emergency Fleet Corporation.

Mr. ROSE. No objection.

(Paper referred to received in evidence and marked "Claimant's Exhibit A, July 7, 1920.")

Hearing closed.

CLAIMANT'S EXHIBIT, MAY 27TH, 1920.

EXECUTIVE ORDER.

By virtue of authority vested in me in the section entitled "Emergency Shipping Fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the

operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by
 88 the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

WOODROW WILSON.

THE WHITE HOUSE,
 11 July, 1917.

[No. 2664.]

EXECUTIVE ORDER.

Whereas in order to avoid confusion in policies, duplication of effort, and conflicting interpretations of the law, unity of control in the administration of the legal affairs of the Federal Government is obviously essential, and has been so recognized by the acts of Congress creating and regulating the Department of Justice;

Now, therefore, I, Woodrow Wilson, President of the United States, by virtue of the authority vested in me as Chief Executive and by the act "authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government," approved May 20, 1918, do hereby order that all law officers of the Government excepting those in the Philippine Islands, including all law officers attached to any executive bureau, agency, or office specially created for the prosecution of the existing war, shall "exercise their functions under the supervision and control of the head of the Department of Justice," in like manner
 89 as is now provided by law with respect to the solicitors for the principal executive departments and similar officers; that all litigation in which the United States or any department, executive bureau, agency or office thereof, are engaged shall be conducted under the supervision and control of the head of the Department of Justice; and that any opinion or ruling by the Attorney General upon any question of law arising in any department, executive bureau, agency, or office shall be treated as binding upon all departments, bureaus, agencies, or offices therewith concerned. This order shall not be construed as affecting the jurisdiction exercised under authority of existing law by the Comptroller of the Treasury and the Judge Advocates General of the Army and Navy.

WOODROW WILSON.

THE WHITE HOUSE.
 31 May, 1918.

[No. 2877.]

EXECUTIVE ORDER.

Delegating to the United States Shipping Board Emergency Fleet Corporation the powers granted to the President by the act of Congress amendatory of the emergency shipping legislation and approved April 22, 1918.

By virtue of authority vested in me by the act of Congress, 90 entitled "An act to amend the emergency shipping fund provisions of the urgent deficiency appropriation act, approved June fifteenth, nineteen hundred and seventeen, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes," approved April 22, 1918, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me by said act.

WOODROW WILSON.

THE WHITE HOUSE,
18 June, 1918.

[No. 2888.]

EXECUTIVE ORDER.

DELEGATING TO THE UNITED STATES SHIPPING BOARD AND TO THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, RESPECTIVELY, POWERS GRANTED TO THE PRESIDENT BY ACTS OF CONGRESS RELATIVE TO THE EMERGENCY SHIPPING FUND AND APPROVED ON OR PRIOR TO NOVEMBER 4, 1918.

Whereas by Executive order No. 2664, dated July 11, 1917, I delegated to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, 91 certain powers vested in me under the section entitled "Emergency Shipping Fund" of the urgent deficiency appropriation act approved June 15, 1917; and

Whereas since the issuance of said Executive order the said powers granted in said act have been variously affected or extended by the section entitled "Emergency Shipping Fund" of the urgent deficiency appropriation act approved October 6, 1917, by Public Act No. 138, 65th Congress, approved April 22, 1918, amending said section of said act of June 15, 1917, and by the sections entitled "Emergency Shipping Fund" in the sundry civil appropriation act approved July 1, 1918, and in the first deficiency appropriation act approved November 4, 1918, respectively—

Now, therefore, by virtue of the authority vested in me by said laws, supplementing said order No. 2664, but in no way limiting or restricting the effect thereof or of acts heretofore done in pursuance

thereof, I do hereby delegate all the power and authority so vested in me, and do direct that—

1. The United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction; and

2. The United States Shipping Board shall have and exercise, subject to its discretion in turn to delegate such exercise as provided in said Executive order No. 2664, all power and authority now
92 vested in me by said laws with reference to constructed dry docks, marine railways and piers, and to constructed vessels or parts thereof or charters therein; to the operation, management, and disposition of such dry docks, marine railways, piers, and vessels; and to such other matters as are not herein mentioned.

3. All acts heretofore done by said corporation or by said board, with reference respectively to the kinds of power or authority herein delegated to each, and which could have been properly done by me under such statutes or any of them, be, and they are hereby, ratified and confirmed.

WOODROW WILSON.

THE WHITE HOUSE,
3 December, 1918.

[No. 3018.]

EXECUTIVE ORDER.

DIRECTING THE UNITED STATES SHIPPING BOARD AND THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION TO DISPOSE OF MATERIAL OR PLANTS IN THEIR DISCRETION.

Whereas "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1920, and for other purposes," approved July 19, 1919, provides:

98 "Any material or plant, as defined under the emergency shipping fund provision of the deficiency appropriation act approved June 15, 1917, acquired by the United States Shipping Board Emergency Fleet Corporation, may be disposed of as the President may direct."

And whereas said deficiency appropriation act approved June 15, 1917, as amended by "An act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes," approved November 4, 1918, defines the words "material" and "plant" as follows:

"The word 'material' shall include stores, supplies, and equipment for ships, and everything required for or in connection with the production thereof.

"The word 'plant' shall include any factory, workshop, warehouse, engine works; buildings used for manufacture, assembling, construction, or any process; any shipyard, drydock, marine railway, pier, or dockyard and discharging terminal, and any facilities or improvements connected with any of the foregoing descriptions or property."

Now, therefore, by virtue of the authority vested in me by said laws, but in no way limiting or restricting the effect of previous Executive orders and proclamations delegating powers and authority to the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation,

94 1. I hereby direct the United States Shipping Board to exercise all powers and authority now vested in me in reference to the disposition of materials or plants as above defined. I hereby direct said board, in its discretion, to sell, lease, or otherwise dispose of such materials and plants, or any portions or parts thereof, by public or private sale or contract, with or without notice, in such lots at such times and places upon such credit, security, and other terms or conditions, and in such manner generally as said board, from time to time, shall deem to the best advantage of the United States.

2. I hereby direct that such sales, leases, or other disposition shall be made directly by the said board or by it, in its discretion, through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

3. I hereby direct that all acts heretofore done by said corporation or by said board with reference to such sales, leases, or other disposition, and which could have been properly done by me under any statutes heretofore enacted covering this subject matter, be, and they hereby are, ratified and confirmed.

WOODROW WILSON.

THE WHITE HOUSE,
11 August, 1919.

[No. 3145.]

95 CLAIMANT'S EXHIBIT A, JULY 7, 1920.

CERTIFICATE OF INCORPORATION.

Know all men by these presents, that we, the undersigned, a majority of whom are residents of the District of Columbia, desiring to form a corporation under subchapter four (4) of the incorporation laws of the District of Columbia, and in pursuance of section eleven (11) of an act of Congress entitled "An act to establish a United States Shipping Board," approved September 7, 1916, do hereby certify:

First. That the corporate name of the company shall be United States Shipping Board Emergency Fleet Corporation and the object

for which it is formed is the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under said subchapter four (4) of the incorporation laws of the District of Columbia.

Second. That the existence of this corporation shall be perpetual.

Third. That the capital stock of this corporation shall be fifty million dollars (\$50,000,000.00), divided into shares of the par value of one hundred dollars (\$100.00) each.

96 Fourth. That the number of trustees who shall manage the concerns of the company for the first year, or until their successors are elected, a majority thereof being citizens of the District of Columbia, shall be seven (7) namely:

Names.	Residence.
George W. Goethals.....	43 Exchange Place, New York, N. Y.
William Denman.....	1020 Merchants' Exchange Bldg., San Francisco. Calif.
John A. Donald.....	18 Broadway, New York, N. Y.
William L. Soleau.....	1361 Harvard St. NW., Washington, D. C.
Richard H. Bailey, jr.....	1439 Fairmont St. NW., Washington, D. C.
Timothy C. Abbott.....	2023 Park Road, NW., Washington, D. C.
Ellsworth P. Bertholf.....	1463 Harvard Terrace, Washington, D. C.

The board of trustees, by the affirmative vote of a majority of the whole board, may appoint from the trustees an executive committee of three (3) members, of which a majority shall constitute a quorum, and to such extent as may be provided in the by-laws, such committee shall have and may exercise all or any of the powers of the board of trustees.

Fifth. That the place in the District of Columbia in which the operations of the company are to be carried on is at Munsey Building in the city of Washington, District of Columbia.

97 This corporation reserves the right to amend, alter, or change any provision contained in this certificate of incorporation, in any manner prescribed by statute, and all rights conferred on stockholders herein granted are subject to this reservation.

In witness whereof, we have hereunto affixed our signatures and seals, this 16th day of April, A. D. 1917.

WILLIAM DENMAN.	[SEAL.]
JOHN A. DONALD.	[SEAL.]
GEO. W. GOETHALS.	[SEAL.]
T. C. ABBOTT.	[SEAL.]
E. P. BERTHOLF.	[SEAL.]
RICHARD H. BAILEY, Jr.	[SEAL.]
WILLIAM L. SOLEAU.	[SEAL.]

I, Edward P. Harrington, a notary public in and for the District of Columbia, do hereby certify that William Denman, John

A. Donald, Geo. W. Goethals, T. C. Abbott, E. P. Bertholf, Richard H. Bailey, jr., and Wm. L. Soleau, parties to the foregoing and annexed certificate of incorporation bearing date of the 16th day of April, 1917, personally appeared before me in this District, this 16th day of April, 1917, and the said William Denman, John A. Donald, Geo. W. Goethals, T. C. Abbott, E. P. Bertholf, Richard H. Bailey, jr., and William L. Soleau, being well known to me as the persons who executed the said certificate of incorporation, acknowledge the same to be their act and deed.

98 In witness whereof, I have hereunto set my hand and seal this 16th day of April, 1917.

[NOTARIAL SEAL.]

EDWARD P. HARRINGTON,
Notary Public, District of Columbia.

My commission expires January 30, 1922.

Office of the recorder of deeds, District of Columbia.

* This is to certify that the foregoing is a true and verified copy of the certificate of incorporation of the United States Shipping Board Emergency Fleet Corporation and of the whole of said certificate of incorporation, as filed in this office the 16th day of April, 1917, and recorded in liber 33, folio 272, et seq. one of the incorporation records of the District of Columbia.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office this 21st day of November, A. D. 1919.

[SEAL.]

(Signature illegible)
Deputy Recorder of Deeds, D. C.

99

TRUSTEE'S EXHIBIT G—MAY 27, 1920.

Confidential information.

Contract No. 460 W. C.
Hulls Nos. 2493-2498 Incl.

Summary of contract with Eastern Shore Shipbuilding Corporation.

Contract for harbor tugs.

Contractor: Eastern Shore Shipbuilding Company, 2 Rector Street, New York, N. Y.

Contractor's yard: Sharptown, Maryland.

Vessels: Six (6) 100' wooden harbor tugs.

Price: \$146,500 per tug.

Deliveries—

1st tug to be delivered on or before Feb. 1, 1919.

2nd " " " " " " Mar. 1, 1919.

3rd " " " " " " Mar. 15, 1919.

4th " " " " " " April 1, 1919.

5th " " " " " " April 15, 1919.

6th " " " " " " May 1, 1919.

100 Payments: Progress plan of payments.

Freight and labor protection: Full freight and labor protection given to the contractor during delivery time, as specified in contract.

Bonus and liquidated damages: \$50 per day—limited to \$7,500 per tug.

Schedule "C" attached to said contract.

In all other respects, except as above noted, this contract is similar in form to contract for steel vessels.

Contract made this 22d day of August, 1918, between Eastern Shore Shipbuilding Corp., a corporation organized under the laws of the State of Delaware, party of the first part (herein called the contractor) and the United States Shipping Board Emergency Fleet Corporation, corporation organized under the laws of the District of Columbia (herein called the owner) representing the United States of America, party of the second part.

For a valuable consideration, receipt of which is hereby acknowledged by both parties and in consideration of the mutual promises of the parties, it is agreed as follows:

I.

Shipyards.

1. The contractor agrees to maintain upon a suitable site, a
101 complete shipbuilding plant, including unobstructed channel to high seas, office building, shops, building slips, plant equipment, and appurtenances including adequate protection against fire, fencing and other necessary arrangements for protection of the yard and the owner's interests against trespassers; necessary and proper hygienic and sanitary conditions; which site shall be served with ample facilities for the transportation of materials and employees and shall be so located as to have available sufficient housing accommodations for contractor's employees, all to be satisfactory to the owner and adequate to insure the construction, completion, and delivery of the vessels under the terms and at the time herein provided for.

Launching ways, depth of water, etc.

2. The contractor shall, subject to the approval of the owner, at its own expense provide and maintain adequate shipways and ample depth of water for launching the vessels herein contracted for and for navigating said vessels to the high seas. In case any dredging is required for the launching of the vessels herein contracted for or for the navigation of said vessels to the high seas, and the contractor fails to do such dredging within a reasonable time after being so requested by the owner, the owner shall have the right to do such dredging as may be required, the total cost thereof to be deducted from any moneys due or to become due the contractor.

The contractor shall, before launching the respective vessels herein provided for, submit its plans and arrangements for such launching to the inspector or representative of the owner designated for that purpose, for his comment and approval, to the end that the launching of the vessels herein provided for may be accomplished without accident or delay.

3. The contractor agrees to construct at its own risk and expense under the rules and regulations of the American Bureau of Shipping six (6) 100-foot wooden harbor tugs (hereinafter referred to as the vessels) complete with propelling machinery, auxiliaries, and equipment in accordance with the owner's standard drawings and specifications hereto attached, as prepared by J. Murray Watts, with the following modifications, however: (a) The structure of the vessel to be of long-leaf yellow pine, except the keel, garboard strakes, frames, and stem and stern construction, which are to be of oak, as specified. (b) A wooden deck house of first-class construction in every particular, such as is regularly furnished for vessels of this type to be substituted for a steel deck house. The modifications or changes as provided in "a" and "b" are to be in accordance with all requirements of the American Bureau of Shipping, and are to be shown on modified plans and specifications to be prepared by the contractor. All drawings and specifications before binding upon the owner must bear the acceptance and approval of the owner. The owner will furnish such plans and specifications as it is in a position to supply, and additional plans or specifications required for the proper guidance of the contractor in carrying on the work to be supplied by the contractor at its expense.

4. The vessels when constructed will bear the highest classification for wooden harbor tugs of the American Bureau of Shipping and will be fully equipped and ready for sea service, notwithstanding any omissions in the plans and specifications, and delivered by the contractor to the owner afloat at the works of the contractor at Sharptown, Maryland, as follows:

	1919.
First vessel to be delivered on or before	Feb. 1
Second " " " " " "	Mar. 1
Third " " " " " "	Mar. 15
Fourth " " " " " "	Apr. 1
Fifth " " " " " "	Apr. 15
Sixth " " " " " "	May 1

II.

Price.

1. In consideration of the performance of this agreement by the contractor the owner agrees to pay therefor a lump-sum purchase price of one hundred forty-six thousand five hundred dollars (\$146,500) for each of such completed vessels.

Method of payment.

2. The method of payment to the contractor shall be as follows:

(a) Ten per cent (10%) of the contract price of said vessels within thirty (30) days after the signing of this contract.

(b) Ten per cent (10%) of the contract price of each vessel when the keel thereof is laid and one-fourth ($\frac{1}{4}$) of the framing timber for said vessel is in the contractor's yard, or its equivalent in work done.

(c) Ten per cent (10%) of the contract price of each vessel when all of the square frames to said vessel are in place, or its equivalent in work done.

(d) Ten per cent (10%) of the contract price of each vessel when the center and sister keelsons to said vessel are in place, cant frames erected, and stem and stern posts up, or its equivalent in work done.

(e) Ten per cent (10%) of the contract price of each vessel when said vessel is ceiled and clamps are in, or its equivalent in work done.

(f) Ten per cent (10%) of the contract price of each vessel when shelf strakes or hanging knees are in place and deck houses are in, or its equivalent in work done.

(g) Ten per cent (10%) of the contract price of each vessel when said vessel is planked and the waterways in place, or its equivalent in work done.

(h) Ten per cent (10%) of the contract price of each vessel when decks are laid, and the decks and the outside of the vessel entirely caulked, or its equivalent in work done.

(i) Ten per cent (10%) of the contract price of each vessel when the vessel is successfully launched, and machinery, boilers, equipment, and auxiliaries installed, or its equivalent in work done.

105 (j) The balance of the contract price of each vessel when the vessel has been completed, and on delivery to and conditional acceptance by the owner of such completed vessel, at which time an examination shall be made of the contractor's accounts by the owner, and an adjustment, including allowances or deductions for bonus or liquidated damages, additions, or omissions, if any, shall be made, and the balance shall be paid to the contractor.

Provided, however, that the owner reserves the right to retain from such payment the sum of fourteen thousand six hundred and fifty dollars (\$14,650) per vessel until such time as the said vessel is finally accepted; and provided further, that in lieu thereof, the contractor may, if it so desires, furnish a surety bond (in form satisfactory to the owner) in the sum of fourteen thousand six hundred and fifty dollars (\$14,650) and in a company or companies acceptable to the owner, conditioned upon the correction of defects, if any, in the vessel in accordance with sections 8 and 9 of this article.

"Work done," as used in the foregoing paragraphs, shall mean and represent the actual value of materials delivered at the works of the contractor, inspected and passed by the owner's authorized representative, together with the actual cost of all labor expended upon

the vessels and/or cash actually paid out upon subcontracts (if approved by the owner or its duly authorized representative) for propelling and deck machinery and a proper proportion of overhead expenses incurred only on account of the vessels herein contracted for and to be determined by the owner or its duly authorized representative.

106 3. The payments described in subdivision (a) of section 2 of Article II hereof shall be deposited in the name of the owner with a depositary or depositaries designated by the owner. The money so deposited shall be withdrawn and used only in payment for labor employed and/or material used exclusively in the construction of the vessels, a proper proportion of overhead expense, and upon contracts (if approved by the owner) for propelling and deck machinery, and no part thereof shall be used for the contractor's plant, yard, machinery, tools, or other yard equipment or ways. Such withdrawals shall be made only upon checks or drafts drawn by the contractor and countersigned by the duly authorized representative of the owner. Such checks or drafts will be countersigned only upon receipt of and in accordance with vouchers for labor and/or material and overhead expenses as aforesaid, for the vessels and subcontracts, which have been signed by the contractor and approved in form and substance by the duly authorized representative of the owner. The title to such deposit and interest thereon shall be and remain in the owner until withdrawn as aforesaid.

In the event of any default of the contractor hereunder, the owner upon its notice to the depositary or depositaries of such default shall have the right to withdraw upon its sole order the said deposit or any part thereof.

Payments represented by progress.

4. It is agreed that as to all the installment payments provided for in section 2 of this article after the first payment described in subdivision (a) of said section 2 no payment made shall, with
107 the payments theretofore made, exceed the value of the labor and materials and overhead expense for the vessels herein contracted for, already expended up to that time, and cash actually paid out upon contracts (approved by the owner) for propelling and deck machinery, all as provided in section 3, and such fact is certified to by the owner's district supervisor and accepted as satisfactory by the owner.

Material and equipment.

5. The owner agrees to cause to be furnished to contractor f. o. b. place of manufacture, and the contractor agrees to accept the materials and equipment in the amounts and to pay for the same at the prices set out in schedule "C" hereto attached and made a part hereof. In the event that the owner shall purchase any or

all of such materials or equipment at prices less than those set out in schedule "C," the owner shall be entitled to the saving.

Trials.

6. Before conditional acceptance of any of the vessels by the owner, the contractor shall make, at its own expense, a dock trial of not less than six hours' continuous operation of the vessel's main engines and auxiliaries (and otherwise, as provided for in the specifications), which shall be to the satisfaction of the owner. In the event such trials shall be interrupted or otherwise not completed, a new trial may be had which shall be not less than six hours' continuous duration, as aforesaid. At the option of the owner, it may require a trial in free course of not less than
108 four hours for any one or more of the vessels. Such trial shall be at deep-load draft. In the event such trial is satisfactory, the owner may waive its option to require a trial at deep-load draft for any of the other vessels, but may require a trial in free course of the same duration at a lesser draft and correspondingly increased speed, such speed to be determined by the owner. The results of all trials must be satisfactory to the owner and all trials shall be at the contractor's expense. In the event the result of any trial is unsatisfactory to the owner the contractor shall have the right to repeat such trial at its own expense.

Conditional acceptance.

7. When a vessel has been completed in accordance with the plans and specifications and any changes therein authorized, and is otherwise satisfactory, such vessel shall be taken over and conditionally accepted by the owner.

Defects.

8. If, at any time within six months after the aforesaid conditional acceptance of any of the said vessels, any defects in the material or workmanship, other than such as are due to fair wear and tear or misuse, shall appear, such defects shall be corrected and repaired to the satisfaction of the director general of the owner at a port in the United States and at the contractor's expense, provided that the liability of the builder in this respect shall not extend beyond the actual replacement or remedy of such defective parts; and, provided further, that if the vessel can not be conveniently re-
109 paired at a port in the United States the builder's liability shall be limited to a sum equivalent to the cost of supplying the material and doing the work in question at a port in the United States.

Final acceptance.

9. At the expiration of six months from the conditional acceptance of a vessel, it shall be finally accepted, providing no defects shall

have appeared other than those due to fair wear and tear or mis-use as aforesaid, or in case any defects shall have appeared, providing such defects have been remedied to the satisfaction of the owner. In either of said events, any balance of money reserved and due the contractor under the terms hereof, shall be paid in full.

Inspector's certificate.

10. No inspector's certificate given or payment made under the terms of this contract (except the final payment provided for in section 9 of this article) shall be conclusive evidence of the performance of this contract, either in whole or in part, and no payment shall be construed to be an acceptance of defective work or improper materials. Every facility shall be afforded by the contractor to the inspectors appointed by the owner. It shall be the right and duty of such inspectors, either personally or by deputies, to inspect all materials and workmanship entering into the construction, and to accept such materials and/or workmanship as are in conformity with the specifications, and promptly to reject all materials and/or workmanship as which do not comply with the specifications; such
 110 condemnation, if any, of materials to be made by such inspectors whenever defects are discovered prior to the final acceptance of the vessel by the owner. Notice of rejection shall be in writing, signed by an authorized representative of the owner.

Wages to be paid.

11. It is agreed that the wages paid shall be those fixed by the shipbuilding labor adjustment board for the third district, effective as of the date of this contract. In the event the adjustment board shall make any general increase in the scale of wages, the net increase in labor cost for the vessel shall be borne by the owner; except as provided in section 13 hereof, in the event of any decrease the owner shall receive the sole benefit thereof. If Sunday, holiday, night, or overtime work be resorted to, it shall be without additional expense to the owner unless specifically authorized by the owner in advance.

Protection for increased freight rates.

12. The owner agrees to pay the increase in freight rates over those in force at the date of this contract, upon all material, machinery, and equipment used in the vessels herein contracted for, except as provided in section 13 hereof. Reimbursement of the contractor for the excess paid over the rates in force at the date of this contract shall be made monthly if practicable.

Delayed deliveries—no protection on freight or labor.

13. Should the contractor fail to deliver any vessel on or
 111 before the delivery date herein specified for such vessel, or as

extended under section 2 of Article III hereof, the contractor shall receive no protection against any increase in freight rates on material and equipment used in the construction of such vessel, and/or against any increase in the cost of labor on such vessel above the freight rates and/or scale of wages in force at the date of this contract, during the period of time elapsing between the delivery date specified for such vessel, or as extended under said section 2 of Article III and the date on which such vessel is actually delivered and conditionally accepted.

Inspectors and auditors.

14. The owner's inspectors or other duly authorized representatives shall have full and free access to the works of the contractor and to all work and materials on hand. The owner's auditor shall have the right at reasonable and proper times to inspect the contractor's accounts, records, and original entries, vouchers, and supporting papers in connection with the work carried on under this contract.

Insurance.

15. Subject to the approval of the owner and the exceptions hereinafter expressed, the contractor agrees to procure and thereafter maintain insurance in companies satisfactory to the owner, in amounts and form to cover the full builder's risk upon the vessel or vessels to be constructed under this contract, and, in addition thereto, insurance to cover such other risk and contingencies during such periods and in such amounts as the owner shall require. The
112 policies shall provide that the loss, if any, shall be payable to the owner and the contractor, as their respective interests may appear. Before placing any such insurance the contractor shall furnish the owner with complete information regarding the amounts, companies, cost, and any other particulars with regard thereto called for by the owner, all of which shall be subject to the owner's approval. The owner may dispense with insurance, in whole or in part, or may itself carry the risk, in either of which events the contract price shall be reduced by an amount corresponding to the cost of said insurance so waived or risk carried by the owner. The owner reserves the right to direct the placing or arrangement of any or all of the insurance under this contract. Should any one or more of the vessels provided for by this contract be partially or totally destroyed by fire or other casualty beyond the control of the contractor, no additional vessel or vessels shall be built under this contract to replace those lost unless required by the owner in writing. If no additional vessels be ordered, the owner shall pay, within sixty days after such loss or destruction, to the contractor, for its profit on work done on such vessel up to the time of such loss or destruction, such sum as the director general of the owner may determine to be fair and just, subject to arbitration as provided in Article VI hereof.

III.

Alterations.

1. The owner shall have the right, but only by orders in writing, to make such reasonable alterations, omissions, additions, or
113 substitutions not materially affecting the general design of the vessels as the owner may deem necessary. The contractor agrees to accede to and carry the same into effect, as though such alterations, omissions, additions, or substitutions were originally provided for in this contract. If by reason thereof the cost of construction hereunder shall be increased, then the sum to be paid by the owner to the contractor as herein provided shall be increased by an amount which shall be agreed upon. If the construction shall be rendered less expensive by reason thereof, the sum to be paid shall be decreased by an amount which shall be agreed upon. In case the parties are unable to agree as to the effect of such alterations, omissions, additions, and substitutions, or the cost thereof, the dispute shall be determined as provided for by Article VI hereof.

Delay.

2. If the contractor be delayed or obstructed in the transaction or completion of the work provided for by this contract by the delay, neglect, or default of the owner, or by reason of alteration or additions by the owner, or the commandeering by the United States Government of materials on the ground or materials purchased by the contractor but not delivered, or by reason of strikes, fires, lightning, earthquake, flood, riot, insurrection, or war or by reason of suspension of deliveries of material or machinery for any of the causes above stated, or by delay or failure of manufacturers to deliver material or machinery which the owner agrees to cause to be furnished to the contractor, pursuant to section 5 of Article
114 II hereof, or by reason of instructions given by owner under Articles XI and XXI hereof, or by any other cause beyond the reasonable control of the contractor, beyond the time herein fixed, the time of delivery shall be extended for a period equivalent to the time lost by reason thereof. Provided, that no request for extension of the contract time shall be considered unless the contractor, within twenty (20) days from the occurrence of an alleged cause of delay, shall notify the director general of the owner, in writing, of the facts and circumstances in each case and of the extent to which the contractor claims that the completion of the vessel is thereby delayed; and provided further that the owner may, without prejudice to the rights of the contractor, reserve its decision upon any and all claims for extension until the completion of the vessel, the work in the meantime not to be discontinued or delayed on account thereof. In the event

that the parties shall not agree as to such extension, such extension shall be determined in accordance with Article VI hereof.

IV.

Forfeiture.

The progress of the work must at all times be satisfactory to the owner. Upon any failure or omission of the contractor to make such satisfactory progress (unless caused by circumstances beyond its control), the owner may declare this contract forfeited. In that event the owner may immediately enter the shipyard and take possession of it and its facilities and of the vessels and materials and equipment. The owner shall thereupon cause to be taken
115 and filed with the United States Shipping Board a full and a complete statement and inventory of all work done or begun on or about the vessels and of all materials on hand applicable thereto. The owner may proceed with the completion of the vessels whether at the contractor's shipyard with its equipment and facilities, or elsewhere, by contract or otherwise, and in its discretion use for this purpose all suitable materials on hand and included in the inventory and contractor's shipyard and facilities, or any part thereof.

Provided, however, that if the contractor can show to the satisfaction of the director general of the owner reasonable industry and good faith in the prosecution of the work hereunder, and that the delays have been caused by circumstances over which it had no control, the contractor shall be allowed such opportunity as the director general of the owner may deem reasonable to complete the work.

V.

Title.

It is agreed that title to all vessels, either completed or under construction, in so far as they shall have been inspected and approved by the owner, shall be in the United States of America, and that the title to all material for the furtherance of work under this contract, however and by whomsoever contracted for or assembled or set up in the shipyard or used in the construction of the work under this contract, shall be in the owner at all times. Nothing contained
116 herein, however, shall be construed as a waiver by the owner of its right to direct the replacement of unsatisfactory workmanship and/or materials at the contractor's expense.

VI.

Disputes.

In case the parties fail to agree as to any matter connected with this contract, or any doubt or dispute arises as to the meaning or

effect of this contract or of the drawings and specifications which are a part hereof, or as to the manner of doing the work provided for hereunder, or as to materials used or the time to be allowed or the amounts to be paid or allowed for alterations, omissions, additions, or substitutions, or as to any other particular, the matter shall be promptly referred to and determined by the director general of the owner, and his decision shall be final and binding upon the parties.

In case, after delivery of a completed vessel to the owner under this contract (but only in that event), the contractor shall deem that it is aggrieved by any decision of the director general as to any disputed matter hereunder of any kind, and shall give notice in writing to the owner to that effect within sixty (60) days after delivery or after final payment by the owner, such matter shall be determined by a board which shall consist of three naval architects or engineers, or other experts to be appointed, one by the owner, one by the contractor, and the third arbitrator shall within ten (10) days be selected by the two arbitrators first chosen, and if they can not agree on such third arbitrator, then the latter shall be named by the
 117 classification society under which the vessels are being constructed. Such board shall, within thirty (30) days after submission of such matter to it, make its determination, and its findings (made by a majority of the board) shall be conclusive and binding on both parties.

VII.

Time of essence.

It is agreed by both parties that time is of the essence of this contract. The contractor shall commence and carry through to completion the work under this contract with all possible dispatch, shall give precedence in its plant or plants to the work hereunder, subject only to the prior rights, if any, of a department of the United States of America, and will not enter into any other contract or undertake any other work or service which will interfere in any material manner with the completion of the work undertaken hereunder.

VIII.

Bonus and liquidated damages.

Should the contractor succeed in delivering any of said vessels to the owner complete before the respective delivery dates above provided, the owner agrees to pay, as premium for advanced delivery for each completed vessel so delivered, the sum of fifty dollars (\$50.00) per day for each and every day gained by such advanced delivery. Should the contractor fail to deliver any of said vessels on the dates herein fixed, or as extended on account of the causes

hereinbefore set out in Article III, section 2, the contractor
118 agrees to pay the owner, as liquidated damages on each such vessel fifty dollars (\$50.00) for each and every day of delay in delivery of such vessel; but it is hereby agreed that the total premium or liquidated damages so to be paid shall in no case exceed the sum of seven thousand five hundred dollars (\$7,500) for any such vessel. Premiums or liquidated damages shall be added to or subtracted from the final payment hereunder; provided, however, that any extensions of time for the completion of the vessels granted to the contractor shall not operate to give to the contractor any bonus upon vessels delivered during such extended time, but such extensions shall operate to defer the time from which liquidated damages shall run.

IX.

Liens and taxes.

The contractor agrees to deliver the vessels to the owner free and clear of any lien or encumbrance. The contractor further agrees upon the delivery of each vessel to deliver to the owner all papers and documents necessary and/or convenient to confer upon the owner a full and unencumbered title to such vessels, including classification certificates as herein provided, and such other certificates and documents as may be necessary or required by law, together with a full release by the contractor to the owner waiving all further claims or demands of any nature, except any claim or demand in regard, and to the extent, to which the provisions of Article VI have been and/or are invoked. When a payment is to be made
hereunder, the owner may require evidence satisfactory to
119 it to be furnished showing what obligations for labor and materials, supplies, or equipment used or to be used in the construction of the vessels hereunder are unpaid, and the owner may at its option, out of any amount not paid to the contractor hereunder, withhold such amount as may be necessary to satisfy such obligations, or, with the consent of the contractor, satisfy the same. In the event of the filing or attaching of any lien or encumbrance (whether valid or invalid) against any of the vessels before the final payment, the owner may at its option, out of any amounts not paid to the contractor hereunder, withhold such amount as may be necessary to satisfy such lien or encumbrance, or may satisfy or remove the same. The owner will not exercise its option to satisfy or remove any lien or encumbrance if the contractor desires to contest it, provided that the contractor will immediately take such steps as in the judgment of the owner will prevent such lien or encumbrance from delaying the construction or delivery of the vessels hereunder, and will indemnify and save the owner harmless from any cost, charges, or damages incurred by reason of the contesting of such lien. It is hereby further stipulated and agreed by the contractor for itself and on its own account and for and on ac-

count of all persons, firms, associations, and corporations furnishing labor and materials for said vessels that this contract is upon the express condition that no lien or rights in rem, of any kind, shall lie or attach upon or against any of said vessels, or their machinery, fittings, or equipment, or the materials therefor, or any part thereof, or for or on account of any work done upon
120 or about said vessels, machinery fittings, equipment, or materials, or of any materials furnished therefor or in connection therewith, nor for or on account of any other cause or things, or of any claim or demand of any kind, except the claims of the owner.

The contractor agrees to pay all the taxes, if any, which may be assessed or assessable against the materials on hand and the vessels under construction up to the time said vessels shall be accepted by the owner. The contractor further agrees to pay all income taxes, excess profit taxes, and all other municipal, State, or Federal taxes which may be assessed or assessable on account of this contract.

X.

Claims and patents.

The contractor agrees to protect the owner from all claims arising from accidents or casualties to employees, workmen, or other persons in, on, or about the work covered by this contract, and to indemnify the owner against the same.

The contractor shall be responsible for all claims, if any, made against the owner for all infringements of patents or patent rights and for the use of all patented articles, and shall defend and save harmless and indemnify the owner against all such claims, and from all costs, expenses, and damages which the owner may be obliged to pay by reason of any such infringement of patents or patent rights, or of the use of patented articles, provided that the owner will, in all instances, notify the contractor of any claims made against it
121 by reason of any such infringement or use of patented articles at the time when such claim is made, and will promptly notify the contractor of any suit or suits brought against it therefor and give the contractor an opportunity to defend the same, and provided that no payment shall be made by the owner unless with the consent of the contractor or pursuant to a decree of a proper court in such litigation. Where the owner specifically orders the use of the patent or patented article, whether or not the existence of the patent is known to the parties hereto, the owner will hold the contractor harmless from any expense, loss, or damage arising from a claim of the infringement or use of such patent or patented article, except where the contractor's plan and/or specifications provide for such use, and provided that the contractor notifies the owner as soon as such a claim is made, and obeys the instruction of the owner in connection therewith.

XI.

Labor.

This contract is executed and delivered upon the understanding that, if desired by the United States Shipping Board Emergency Fleet Corporation, a provision, satisfactory in form and terms to the United States Shipping Board Emergency Fleet Corporation, restricting the hours of labor of laborers and mechanics employed by the contractor or by subcontractors and/or providing for the payment of extra compensation for overtime work, will be inserted in the contract, with the same force and effect as if inserted in the contract before the execution and delivery thereof. If by reason of any
122 such instruction the cost of any vessel hereunder shall be increased, then the sum to be paid by the owner to the contractor as herein provided shall be agreed upon by the parties, and if not agreed upon shall be determined as provided in Article VI hereof.

XII.

Not assignable.

This contract may not be assigned by the contractor without the consent of the owner in writing, provided, however, that nothing in this contract shall be construed as prohibiting the assignment of payments due, or to become due, to the contractor, for the purpose of obtaining credit for furthering the construction hereby undertaken, but the owner may by writing make such prohibition.

In order to effectuate the provisions of Article IV hereof, the contractor agrees that every contract made by it for the furnishing to it of parts, materials, supplies, machinery, and equipment, or the use thereof for the purpose of constructing the vessels agreed to be constructed hereunder, will in its terms be made assignable to the owner.

XIII.

Members of Congress not to benefit.

No Member of or Delegate to Congress, nor Resident Commissioner, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this article shall not
123 apply to any contract within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

XIV.

Insolvency of contractor.

Should the contractor become insolvent, make an assignment or commit any act of bankruptcy, the owner may and is hereby empowered forthwith to enter, take possession of, and complete the work without giving any notice thereof to the contractor.

XV.

Laborer's and material men's bonds.

The contractor agrees to procure and keep in force at its own expense, in some company or companies approved by the owner, all such bond or bonds for the protection of claims and/or liens of laborers and/or material men, as may be required by the laws of the United States or of any State.

XVI.

Additional plant protection.

In addition to the precautions that have heretofore been taken by the contractor for the guarding and protection of its plant, and of the work being carried on therein, the contractor shall, at its own cost, provide such additional watchmen, guards, and devices for the protection of its plant and property and of the work in progress for the owner against fire, espionage and acts of war, and any damage or delay that might result therefrom as may be required by the owner, and the contractor further agrees at its own expense to promptly comply with all instructions given it by the owner in regard to the management and conduct of its fire protection, watching and guarding systems; any saving in insurance by reason thereof to accrue to the contractor. Or the owner, at its option, may furnish and install such devices, in which event the owner shall receive the benefit of any reduction in insurance as a result thereof. Should the owner install such devices and fixtures although affixed to the realty, they shall be and remain the owner's property, with the right to remove the same upon the termination of this contract. The contractor shall have the right to purchase such fixtures and improvements upon the completion of the contract on the basis of cost to the owner, less the amount received by the owner by way of reductions in premiums and less a reasonable allowance for depreciation, if any. If the price can not be agreed upon, it shall be determined by arbitrators appointed in the manner provided for in Article VI. In the event the owner installs the fixtures or improvements or pays the cost thereof, the contractor agrees that it will execute such chattel mortgage, bill of sale, or other instrument which may be recorded, for the purpose of protecting the owner's right and title in and to the property so furnished or paid for by it.

XVII.

Permits.

The contractor agrees to comply with all laws, rules, regulations, and requirements of the departments of the United States affecting the construction of works, plants, and vessels, on or on navigable waters and the shores thereof, and all other waters

subject to the control of the United States, and to procure at its own expense all permits from the United States, State, and local authorities which may be necessary to begin and carry on to completion, the work hereunder, and at all times to comply with all United States, State, and local laws in any way affecting the work carried on under this contract.

XVIII.

Contractor's organization.

The contractor has furnished to the owner a list of its officers and directors who will manage its affairs as well as a list of its stockholders. As an inducement to the owner to enter into this agreement and in reliance upon their continued service to and connection with the contractor during the performance of this contract, it is agreed that there shall be no change in the officers of the Eastern Shore Shipbuilding Corp. or any sale or transfer of the majority interest in its stock ownership, unless and until the written assent of the owner has been first obtained.

Cancellation.

The progress of the work shall be at all times satisfactory to the owner. Should the progress of the work not be satisfactory to the owner, then the owner may, upon thirty (30) days' written
126 notice to the contractor, cancel this contract as to further performance thereof. Thereupon the contractor shall complete only such vessels, or parts of vessels, as the owner shall direct in writing. The cancellation shall not affect the terms of the contract as to vessels completed or directed to be completed.

The contractor shall be reimbursed for losses sustained by such cancellation. In computing such losses, there shall be included for each vessel under construction a proportionate part of the estimated profit on a completed vessel. Such proportionate part shall not exceed the percentage which the cost of the vessel under construction bears to the cost of a completed vessel. In computing profit or cost the average actual experience of the contractor on vessels constructed for the owner shall be taken as the basis of the computation. In computing such losses the following shall not be included (a) profits on vessels contracted for, the keels of which have not been laid; (b) profits that the contractor might have earned in other transactions.

If the parties can not agree upon the amount of the loss, it shall be determined on the above basis and by arbitrators, chosen as provided in Article VI hereof, and the decision of a majority of the arbitrators shall be conclusive and binding upon the parties hereto.

XX.

Warranty regarding commissions.

The contractor expressly warrants that it has employed no third persons to solicit or obtain this contract in its behalf or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and
127 that it has not paid, or promised or agreed to pay, to any third persons in consideration of such procurement or in compensation for services in connection therewith any brokerage, commission or percentage upon the amount receivable by it hereunder, and that it has not in estimating the contract price demanded by it, included any sum by reason of any such brokerage, commission or percentage, and that all moneys payable to it hereunder are free from obligation to any other persons for services rendered or supposed to have been rendered in the procurement of this contract.

It further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the owner and that the owner may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid, or agreed to be paid.

XXI.

Manner and priority of obtaining materials and equipment.

It is recognized, in view of war conditions, that it may become necessary for the United States to exercise complete control over the manner and priority in which materials, supplies, and equipment necessary for the work hereunder are obtained, by or furnished to, the contractor. It is agreed between the parties hereto that if required by the owner and/or the United States, the contractor will promptly submit to the owner and/or the United States a classified
128 schedule of the contractor's requirements for all materials, supplies, and equipment to be used under this contract, and copies of any or all contracts, agreements, or orders for such materials, supplies, or equipment, and the contractor hereby agrees that it will promptly comply with, and be bound by, any and all instructions issued by the owner and/or the United States with respect to such contracts, agreements, or orders for materials, supplies, and equipment.

XXII.

Checks.

Payments hereunder shall be made by the owner by check addressed to the contractor by mail at 2 Rector St., New York, N. Y.

In witness whereof the parties hereto have caused this contract to be signed by their respective officers and their corporate seals to be hereunto affixed, duly attested, on the day above stated.

[SEAL.]

EASTERN SHORE SHIPBUILDING CORP.,
By ROBERT R. LIVINGSTON,
President.

Attest:

THOMAS O. TAPPAN,
Secretary.

[SEAL.]

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By HOWARD COONLEY,
Vice President.

Attest:

STEPHEN BOURNE,
Secretary.

129 Eastern Shore Shipbuilding Corporation.
2 Rector Street, New York, 100' wooden harbor tugs.

United States Shipping Board Emergency Fleet Corporation.

Instructions to those submitting proposals.

The following is a list of articles and material that the purchasing division of the Emergency Fleet Corporation is prepared to purchase for contractors. It has been prepared for the convenience of those submitting proposals. The following procedure will be pursued.

Before submitting his proposal the shipbuilder will settle with the general purchasing officer as to what articles are to be obtained through the Fleet Corporation. The columns left blank below will be filed in. In this connection, special attention is invited to the notes at the end of this sheet. When the list has been approved by the technical department as to the suitability of the equipment proposed this sheet will become a part of the contract and will be known as Schedule "C."

100' wooden harbor tugs.

130

SCHEDULE "C."

List of material and equipment to be supplied by the Purchasing Division of the Emergency Fleet Corporation.

Item

No. Article, make, size, No. required, price.

1. Marine propelling turbines.
2. Triple expansion marine engines.
3. Boilers (Scotch marine-water tubes), 14' 6" DX 12' 6",
\$22,900.00 each.
4. Anchor windlasses.
5. Capstans.

6. Cargo winches.
7. Steering gears.
8. Main condensers.
9. Auxiliary condensers.
10. Mechanical davits.
11. Generator sets.
12. Switch boards.
13. Search lights.
14. Radio sets.
15. Electric fans.
16. Rough-turned shaft forgings.
17. Rudder stock forgings.
18. Lifeboats with complete equipment.
19. Running lamp equipment.
20. Anchors.
21. Chains.
22. Navigating instruments.
23. Miscellaneous outfit.
24. Communicating system.
25. Oil can and oil equipment.

131 The fact that these articles are obtained through the Emergency Fleet Corporation as a matter of convenience to the contractor shall not operate to relieve the contractor from his responsibility for the proper functioning of the articles in question when worked into or installed in the vessel, the contractor hereby agreeing to assume the full responsibility therefor.

In addition to the items listed, the Purchasing Division of the Fleet Corporation is able to procure other material and equipment which may be necessary in ship construction. Such additional purchases are to be a matter of agreement and arrangement between the Fleet Corporation and the contractor. In cases where the purchasing Division makes purchases for the contractor the articles will be charged to the contractor's account at actual cost, plus two per cent. to cover the cost of purchasing to the Fleet Corporation.

CONFIDENTIAL INFORMATION.

Supplemental agreement #2 to contract 460 W. C.

Supplemental agreement, made this 15th day of February, 1919, by and between Eastern Shore Shipbuilding Corporation, a corporation organized under the laws of the State of Delaware, party of the first part (herein called the contractor), and the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia (hereinafter called the owner), party of the second part, witnesseth:

132 In the performance of contract #460-WC, dated the 22nd day of August, 1918, between the contractor and the owner, it is mutually understood and agreed as follows:

1. The words "or its equivalent in work done" found in paragraphs (b) to (i), inclusive, and the last paragraph of section 2, Article II of the contract are stricken out, meaning and intending thereby that progress payments provided for in said section and article shall be made in accordance with the actual construction work performed as called for in the progress payments, and that the proviso for equivalent in work done shall be eliminated, except that the progress payments shall not at any time exceed the value of the work done by more than the sum of one hundred thirty-one thousand eight hundred and fifty dollars (\$131,850).

2. The contractor shall make, execute and deliver, or cause to be made, executed and delivered unto the owner a bond in form to be approved by the owner and with surety or sureties satisfactory to the owner in the sum of one hundred thirty-one thousand eight hundred fifty dollars (\$131,850) such bond being conditioned upon the faithful performance by the contractor of the work covenanted to be done and performed by it under and by virtue of the terms and provisions of contract 460-WC aforesaid, as amended by the agreement between the contractor and the owner dated the 29th day of January, 1919, providing for the cancellation of the order suspending the construction of three (3) tugs under the said contract 460-WC and as amended by the provisions of this agreement.

133 In witness whereof the parties hereto have caused this agreement to be executed by their respective officers and their corporate seals to be hereto attached, duly attested, on the date first above written.

[SEAL.]

EASTERN SHORE SHIPBUILDING CORPORATION,
By C. H. EGGLE, *Vice President.*

Attest:

CHAS. O. TAPPAN,
Secretary.

[SEAL.]

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By HOWARD COONLEY.

Attest:

STEPHEN N. BOURNE,
Secretary.

Approved 2-14-19.

ENOS THROOP GEER,
Asst. Manager, Contract Division.

Approved 2-15-19.

D. H. BENDER,
By T. ED. NEW, *Asst.*

Approved 2/15/19.

DANIEL H. COX,
Manager Ship Construction Division.

Approved as to form, date 6 Feb. 19.

H. C. LUTKIN, *Legal Division.*

CONFIDENTIAL INFORMATION.

Supplement to contract 460 W. C.

Agreement made this 28th day of January, 1919, between Eastern Shore Shipbuilding Corporation, a corporation organized under the laws of the State of Delaware, party of the first part, herein called the contractor, and the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia, herein called the owner, party of the second part, witnesseth:

Whereas on the 22nd day of August, 1918, the owner and the contractor entered into a certain contract whereby the contractor agreed to construct six (6) wooden harbor tugs for the owner, and the owner agreed to pay the contractor for said harbor tugs, as is more fully set out in said contract, which contract is known as contract #460-WC, and

Whereas under date of November 23rd, 1918, the owner issued an order to the contractor suspending the construction of three (3) tugs under the contract aforesaid, and

Whereas the owner and the contractor desire that the suspense order aforesaid be withdrawn, and that the contractor continue with the construction of the tugs aforesaid,

Now, therefore, in consideration of the premises of the mutual promises herein contained, the owner and the contractor agree and promise as follows:

1. The suspense order of November 23, aforesaid, is hereby
135 withdrawn and annulled, and the said contract of the 22nd day of August, 1918, is in full force and effect.

2. The contractor will make no claims for damages or compensation against the owner by reason of the suspense order aforesaid.

3. The contractor will continue with the construction of all the tugs under the contract of the 22nd day of August, 1918, and will comply with all the terms of said contract except as hereinafter modified.

4. The owner will make the payments to the contractor provided under the said contract of the 22nd day of August, 1918, and will abide by the terms of said contract except as hereinafter modified.

5. The contractor agrees that as to all material which has not yet been ordered for the construction of the tugs under the contract aforesaid, and as to material which has been ordered but which orders can be canceled without cost, such material shall be ordered through the office of the owner's district manager in Baltimore, Md. The owner shall make every effort to supply material on such orders from available material in the district or through the owner's home office. All material ordered from the owner shall be furnished to the contractor at market prices.

In witness whereof, the parties hereto have caused this agreement to be executed by their respective officers and their corporate seals

to be hereto attached, duly attested, on the day and year above written.

[SEAL] EASTERN SHORE SHIPBUILDING CORPORATION,
By R. R. LIVINGSTON, *President*.

136 Attest:

CHAS. O. TAPPAN,
Secretary.
UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By HOWARD COONLEY,
Vice President.

Attest:

WAYNE V. O'NEIL,
Assistant Secretary.

Approved 2-7-19.

H. H. ROUSSEAU,
Manager, Division of Shipyard Plants.
Approved.

W. MURRAY SANDERS,
Acting Manager, Div. Cancellations, Adjustments and Salvage.

Approved.

WILLIAM H. WHITE, Jr.,
General Counsel.

Approved.

Comptroller.

Approved 2-14-19.

D. H. BENDER,
Comptroller,
By T. ED. NEW, *Asst.*

Approved as to form, date 21 Jan. 19.

H. C. LUTKIN,
Legal Division.

137

OPINION OF REFEREE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt, in bankruptcy.

Motion to establish priority claim for \$328,017.72.

The United States Shipping Board Emergency Fleet Corporation claims that they are entitled to a priority claim herein for \$328,017.72. The United States Shipping Board Emergency Fleet Corporation is a corporation incorporated under subdivision chapter 4 of the incorporation laws of the District of Columbia and in pursuance of section 11 of an act of Congress entitled "An act to establish a United States Shipping Board," approved September 7, 1916. The

object of the corporation, as stated in its certificate of incorporation, is the "purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, and in general to do and perform every lawful act and thing necessary or expedient to be done and performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and exercise all the powers conferred by the laws of the District of Columbia upon corporations" under said subdivision 4.

138 The capital stock was \$50,000,000. All this stock is held by the United States except four or five shares to qualify members of the board of directors.

The shipping act is entitled "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the freight and interstate commerce of the United States, and for other purposes."

Certain powers vested in the President were delegated by him to the United States Shipping Board Emergency Fleet Corporation pursuant to authority conferred upon him by acts of Congress.

I do not think that any of these orders have any direct bearing upon the question whether the claim of the United States Shipping Board Emergency Fleet Corporation, which is filed herein in its name, is entitled to a priority because as alleged it is a debt to the United States. While all the stock at the present time except a few shares issued to qualify members of the board of directors belongs to the United States, by section 11 of the original act it is provided that the "Shipping Board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein."

It follows that the United States might cease to own any stock at all in the Emergency Fleet Corporation or might own barely a majority of the stock.

139 The object of the shipping act as stated is, among other things, to create a merchant marine to "meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries." Under section 11 the Shipping Board, which was created by section 3, may, in its judgment, take such action as is necessary to carry out the purpose of this act and may form under the laws of the District of Columbia one or more corporations for the "purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States."

The Emergency Fleet Corporation was such a corporation, and pursuant to the provisions of the shipping act it entered into its contract with the bankrupt corporation for the construction of the six tugs in question. By the terms of its charter one of the objects of

the Emergency Fleet Corporation was the "efficient and profitable conducting" of its business.

The money to finance the Emergency Fleet Corporation appears to have been received from the Treasury of the United States. The contract with the bankrupt corporation was made on the 22nd day of August, 1918, and it is therein recited that said contract is made by the bankrupt, a corporation organized under the laws of the State of Delaware, party of the first part, and the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia (herein called the "owner") representing the United States of America, party of the second part.

140 The emergency shipping fund provision of the urgent deficiencies act of June 15, 1917, provided in section 1 as follows:

"The President is hereby authorized and empowered within the limits of the amounts herein authorized—

"(a) To place an order with any person for such ships or materials as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind, and quantity unusually produced or capable of being produced by such person."

Section 4 is as follows:

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

"Provided, That all moneys turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended."

The Executive orders of the President undoubtedly made the United States Shipping Board Emergency Fleet Corporation the agent for the purposes of the act. The proviso "that all moneys turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended" seems to imply that such moneys, when

141 turned over by the United States Treasury to the Emergency Fleet Corporation, became the moneys of the Fleet Corporation.

The learned counsel have cited a great many cases having more or less bearing upon the questions involved. I think it would be difficult to reconcile all the decisions cited.

My conclusion is that this is a case where the United States Government chose to avail itself of the instrumentality of a private corporation to accomplish certain purposes of more or less public character. The rule governing the case is set forth in the opinion of Chief Justice Marshall in *Bank of United States vs. Planters Bank*, 9 Wheat., 904, as follows:

"It is, we think, a sound principle, that when a Government becomes a partner in any trading company it divests itself, so far as

concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to the level with these with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted."

In *Salas vs. United States*, 234 Fed. Rep., 842, a case in the Circuit Court of Appeals in this Circuit, Judge Ward remarked at page 844:

"When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation. * * * Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the railroad company sues and is sued like any other corporation in its own name. * * * Therefore, we are of the opinion, that the combination proved did not defraud or intend to defraud the United States."

The claimant to succeed must prove under section 64 of the bankrupt act that the debt is a debt "owing to any person who by the laws of the States or the United States is entitled to priority."

Section 3466 of the Revised Statutes provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall first be satisfied."

The proof of debt is made in the name of the Emergency Fleet Corporation, and I think there is no doubt but that the debt is owing to the Emergency Fleet Corporation, but I don't think it follows that on that account it is owing to the United States.

My conclusion is that the debt is not a debt owing to the United States and therefore is not entitled to priority.

Counsel for the claimant cites the case of *Hibner Oil Company*, 45 A. B. R. 380 decided in the Circuit Court of Appeals in the Seventh Circuit. The claim there was for unpaid freight charges due from the bankrupt on oil shipments made in August, 1918, over the New York Central Railroad. The claim was held to be a debt owing to the United States, but the court's decision would appear to have been founded upon the fact that the act of Congress with respect to the railroads contained a provision that:

"Moneys and other property derived from the operation of the carrier during Federal control are hereby declared to be the property of the United States. * * * At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United States to the credit of the revolving fund created by this act."

Judge Alschuler, in his opinion in the *Hibner* case, remarks:

"This section unqualifiedly declared the ownership of the money and other property derived from operation of the carriers to be in the United States."

I find no corresponding provision in any of the acts of Congress relative to the Emergency Fleet Corporation. My conclusions in this regard derive support from the remarks of Judge Learned Hand in the Gould Coupler case, 261 Fed. Rep., 716, as follows:

"Moreover, it is in general highly desirable that in entering upon industrial and commercial ventures the governmental agencies
144 sued should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed. The immunity of the sovereign may well become a serious injustice to the citizen, if it can be claimed in the multitude of cases arising from Government activities which are increasing so fast. At least I have no disposition to strain the point in their favor where they fall clearly within the principle of authoritative decision."

The other question involved is, What is the just amount of the petitioner's claim? It is conceded that payments amounting to the sum of \$428,017.72 were made by the United States Shipping Board Emergency Fleet Corporation. Upon the bankruptcy of the Ship Building Corporation the Emergency Fleet Corporation took over the six tugs in their uncompleted condition. The petitioner claims that the bankrupt is entitled to be credited with the amount only of the value of these tugs in their uncompleted condition. The trustee, on behalf of the bankrupt, claims that it is entitled to be credited with the actual amount of money expended upon the tugs for labor and material and overhead charges.

I think the amount with which the bankrupt corporation is to be credited is the fair value of the tugs in their uncompleted condition when taken over by the Emergency Fleet Corporation.

The evidence as to the value is meager and unsatisfactory. The witnesses for the trustee show that in labor, material, and overhead charges the bankrupt corporation expended more than \$160,000, and state that in their opinion the tugs were at the time of the
145 bankruptcy worth the amount thus expended upon them. But that does not follow because the bankrupt corporation may have been unreasonably extravagant in its expenditures in the construction of the tugs. Moreover, common experience would show that structures of the kind such as these tugs in an uncompleted condition could not be sold for the amount of moneys expended on them. The testimony for the petitioner is to the effect that the tugs in the condition they were when taken over at the time of the bankruptcy were not of a greater value than \$100,000. As between these two estimates I am inclined to think that the estimate of the petitioner is more likely correct.

I therefore find that bankrupt should be credited with the sum of \$100,000, leaving the amount of the claim at \$328,017.72.

An order may be entered in accordance with the foregoing conclusions.

Dated, New York, Sept. 17th, 1920.

PETER B. OLNEY,
Referee.

146

ORDER OF REFEREE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

A petition having been filed with Honorable John J. Townsend, then referee in charge of this case, by the United States Shipping Board Emergency Fleet Corporation, praying that the claim of said United States Shipping Board Emergency Fleet Corporation, alleged to represent the United States of America, be fixed and allowed as a priority claim herein in the sum of \$328,017.72, and the trustee having filed an answer and an amended answer to said petition, and the matter having duly come on to be heard on notice of motion by the trustee, for an order disallowing said claim as a priority claim, and after hearing Henry J. Gibbons, Esq., of counsel for the United States Shipping Board Emergency Fleet Corporation, for the petition, and Samuel Rose, Esq., of counsel for the trustee, in opposition thereto, and due deliberation having been had,

Now, it is upon the evidence adduced and upon reading and filing the opinion of the referee dated the 17th day of September, 1920,

Ordered as follows:

1. That the said petition of the United States Shipping Board Emergency Fleet Corporation for the allowance of its claim as a priority claim be and the same hereby is in all respects denied.

2. That the said claim of the United States Shipping Board Emergency Fleet Corporation be and the same hereby is allowed as a general claim only, in the sum of \$328,017.72.

Dated, New York, September 27th, 1920.

PETER B. OLNEY,
Referee in Bankruptcy.

148

PETITION FOR REVIEW.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.
Bankruptcy No. 26683.

To PETER B. OLNEY,
Referee in Bankruptcy.

The petition of the United States Shipping Board Emergency Fleet Corporation, representing the United States of America, respectfully shows:

That your petitioner, representing the United States of America, is a creditor of the Eastern Shore Shipbuilding Corporation, the above-named bankrupt, in the sum of \$328,017.72, said sum being the balance due your petitioner, representing the United States of America, for certain moneys advanced to the bankrupt corporation by the United States of America, under and pursuant to the terms of a certain contract dated August 22, 1918, and supplemental contracts dated, respectively, January 28, 1919, and February 15, 1919, all entered into between the Eastern Shore Shipbuilding Corporation, the above-named bankrupt, and your petitioner, representing the United States of America.

That a proof of debt for said sum of \$328,017.72, with claim of priority was filed herein on or about the 2nd day of September, 1919, by your petitioner, representing the United States of America.

149 That on the 27th day of September, 1920, an order, copy of which is hereto annexed, was made and entered herein, allowing said claim in the sum of \$328,017.72 only as a general claim and denying its allowance as a priority claim.

That such order of the 27th day of September, 1920, was and is erroneous in that it denies the claim of priority for said debt, for the reason that said debt was and is a debt due and owing to the United States of America, and therefore is entitled to priority under section 64 of the bankruptcy act and under section 3466 of the Revised Statutes.

Wherefore, your petitioner, feeling aggrieved of such order, prays that the same be reviewed as provided in the bankruptcy law of 1898 and General Order No. XXVII.

Dated, New York, Sept. 29, 1920.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
By D. S. EDMONDS,
Assistant Secretary,
Representing the United States of America.

FRANCIS G. CAFFEY,
*United States Attorney for the Southern District of New York,
Solicitor for the Petitioner, Office and P. O. Address, U. S. Court
and P. O. Building, Borough of Manhattan, New York, N. Y.*

Approved as to form.

HENRY J. GIBBONS,
Assistant Counsel.

150 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

D. S. Edmonds on this 28th day of September, 1920, before me, Francis J. Lynch, a notary public, personally came D. S. Edmonds, to me known, and duly sworn, d'ed depose and say that he was assistant secretary of the United States Shipping Board Emergency Fleet Corporation, described in, and which executed the foregoing petition, and does hereby make solemn oath and say that he has read the

foregoing petition and knows the contents thereof and that the statements of fact therein contained are true according to the best of his knowledge, information, and belief; deponent further says that this affidavit can not be made by the claimant in person because it is a corporation and that he is duly authorized to make this petition.

D. S. EDMONDS.

Sworn to before me this 28th day of September, 1920.

[SEAL.]

FRANCIS J. LYNCH,
Notary Public.

My commission expires at end of next session of senate.

151 TRUSTEE'S PETITION FOR REVIEW OF REFEREE'S ORDER.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

To the Honorable PETER B. OLNEY,
Referee in Bankruptcy.

Your petitioner respectfully shows:

That he is the trustee in bankruptcy herein.

That in the course of the proceedings on the 27th day of September, 1920, an order, a copy of which is hereto annexed, was made and entered herein. That such order was and is erroneous in that it credits the bankrupt corporation with the sum of only \$100,000.00 as the fair value of certain tugs removed by the United States Shipping Board Emergency Fleet Corporation from the shipyard of the bankrupt, instead of the sum of \$160,000.00, and fixes the Fleet Corp. claim at \$328,017.72 instead of \$268,017.72.

Wherefore your petitioner feeling aggrieved because of
152 such order prays that the same may be reviewed as provided in the bankruptcy act of 1898 and General Order 27.

Dated, New York, October 6th, 1920.

ROGER B. WOOD,
Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Roger B. Wood, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

ROGER B. WOOD.

Sworn to before me this 7th day of October, 1920.

[SEAL.]

AMBROSE JOYCE,
Notary Public, Bronx County.

Clerk's No. 18, register's No. 2125.

New York register's No. 73.

Commission expires March 30, 1921.

153

REFEREE'S CERTIFICATE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt, in bankruptcy.

To the honorable the judges of the United States District Court for the Southern District of New York:

I, Peter B. Olney, the undersigned referee, pursuant to General Order XXVII, do hereby certify as follows: There are two questions presented for review, first, the amount of the claim of the United States Shipping Board Emergency Fleet Corporation against the bankrupt, and second, whether such claim was entitled to priority over all other creditors.

A summary of the evidence taken before me is contained in an opinion of the referee bearing date September 17th, 1920, which opinion is herewith filed.

Both parties have filed petitions asking for a review of the order of the referee. The order of the referee thereon is annexed to the respective petitions. The order, however, inadvertently recites
154 the petition as "having been filed with Hon. J. Townsend, then referee in charge of this case." As a matter of fact the petition was filed with the undersigned referee who entered the order.

The petition of the United States Shipping Board Emergency Fleet Corporation claims that the order is erroneous because its claim was not allowed as a priority claim over all other creditors.

The petition of the trustee in bankruptcy in bankruptcy claims that the order is erroneous because the claim was allowed in the sum of \$328,017.72 instead of the sum of \$268,017.72.

The referee files herewith (1) the original petition of proof of claim, (2) the minutes of the hearings taken before him, (3) the petition for review of the United States Shipping Board Emergency Fleet Corporation, (4) the petition for review of the trustee in bankruptcy, (5) the opinion of the referee herein, dated September 17th, 1920, and (6) the order sought to be reviewed which is annexed to the petitions for review.

All of which is respectfully submitted.

Dated, New York, October 13th, 1920.

PETER B. OLNEY, *Referee.*

155

TRUSTEE'S NOTICE OF HEARING OF PETITION FOR REVIEW.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

SIRS: Please take notice that upon the order of the referee herein dated September 27th, 1920, and the petitions to review filed by the United States Shipping Board Emergency Fleet Corporation and the trustee, respectively, and the certificate of the referee dated October 13th, 1920, a motion will be made by the undersigned at a stated term of this court, to be held in the Post Office Building in the borough of Manhattan, city of New York, on the 15th day of November, 1920, at 10.30 o'clock in the forenoon of that day for an order as follows:

1. Affirming that part of the order of the referee which denies the petition of the United States Shipping Board Emergency Fleet Corporation for priority of payment on its claim of \$328,017.72; and

156 2. Reversing that part of the referee's order which fixes the amount of the general claim of the United States Shipping Board Emergency Fleet Corporation at \$328,017.72, and modifying the said order so as to fix said claim at \$268,017.72 and for such other and further relief as may be just and proper.

Dated, N. Y., Nov. 4, 1920.

Yours, etc.,

ROSENBERG & BALL,

Attorneys for Trustee, No. 74 Broadway, New York City.

To—

FRANCIS G. CAFFEY, Esq.,

*U. S. District Attorney, Post Office Building,
New York City.*

HENRY J. GIBBONS, Esq.,

*Assistant Counsel U. S. Emergency
Fleet Corp., Philadelphia, Pa.*

157 CLAIMANT'S NOTICE OF HEARING OF PETITION FOR
REVIEW.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt. In bankruptcy #26683.

SIRS: Please take notice that upon the order of the referee herein, dated September 27, 1920, and the petition to review filed by the United States Shipping Board Emergency Fleet Corporation and the trustee, respectively, and the certificate of the referee, dated October 13, 1920, a motion will be made by the undersigned at a stated term of this court to be held in the United States courts and Post Office Building, borough of Manhattan, city of New York, on the 15th day of November, 1920, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order as follows:

1. Reversing that part of the referee's order, dated September 27, 1920, which denies the petition of the United States Shipping Board Emergency Fleet Corporation for the allowance of its

158 claim as a priority claim, in the sum of \$328,017.72, and which allows said claim as a general claim only; and (2) affirming that part of the referee's said order which fixes the amount of the claim of the United States Shipping Board Emergency Fleet Corporation at the sum of \$328,017.72.

And for such other and further relief as to the court may seem just and proper.

Dated, New York, November 8, 1919.

Yours, etc.,

FRANCIS G. CAFFEY,

United States Attorney, Attorney for United States Shipping Board Emergency Fleet Corporation. Office and post-office address: U. S. Courts and Post Office Building, Borough of Manhattan, City of New York.

To ROSENBERG & BALL, Esqs.,

Attorneys for trustee in bankruptcy,

74 Broadway, New York City.

159 ORDER AFFIRMING REFEREE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt.

A petition having been filed by the United States Shipping Board Emergency Fleet Corporation with the referee in bankruptcy, praying that its claim be allowed in the sum of \$328,017.72, and the priority of payment be granted to said claim, and the referee having made an order, dated the 27th day of September, 1920, denying said petition for priority and fixing the claim of the United States Shipping Board Emergency Fleet Corporation as a general and unsecured claim in the sum of \$328,017.72, and petitions to review said order having been filed by the United States Shipping Board Emergency Fleet Corporation and the trustee, respectively, and the said petitions to review having duly come on to be heard before the undersigned on the 15th day of November, 1920, and, after hearing Edward F. Unger and Henry J. Gibbons, Esqs., of counsel for the United States Shipping Board Emergency Fleet Corporation in favor of the petition to review that part of the referee's order which denies priority of payment on the aforesaid claim, and after

160 hearing Goldfrey Goldmark and Samuel Rose, Esqs., of counsel for the trustee, in favor of the petition to review that part of the referee's order which fixes the said claim at the sum of \$328,017.72, and due deliberation having been had, it is

Ordered that the order of the referee, dated September 27, 1920, be, and the same hereby is, in all respects, affirmed, and both of the aforesaid petitions to review said order be, and they hereby are, dismissed.

Dated, November 18th, 1920.

J. M. MAYER, U. S. D. J.

PETITION FOR APPEAL AND ALLOWANCE.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt. In bankruptcy, #26683.

To the honorables, the judges of the United States District Court for the Southern District of New York:

The United States Shipping Board Emergency Fleet Corporation, representing the United States of America, feeling itself aggrieved by the order and decree of the United States District Court for the Southern District of New York, made by the Hon. Julius M. Mayer, one of the judges thereof, and entered herein on the 18th day of November, 1920, in the above-entitled proceeding, affirming an order of Peter B. Olney, referee, dated September 27, 1920, denying the claim of the United States made herein for and on its behalf by its agent and representative, the United States Shipping Board Emergency Fleet Corporation, to priority of payment out of the assets in the hands of the trustee, and allowing said claim as a general claim of the United States Shipping Board Emergency Fleet Corporation against the bankrupt estate, does hereby petition for an appeal from the said order and decree to the United States Circuit Court of Appeals for the second circuit to do and receive what may pertain to justice to be done in the premises, and that a transcript of the records, proceedings, and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the second circuit.

Dated, New York, November 29, 1920.

UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION,
Representing the United States of America.

By FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York.

162

NOTICE OF APPEAL.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt. In bankruptcy #26683.

SIRS: Please take notice, that the United States Shipping Board Emergency Fleet Corporation, representing the United States of America, hereby appeals from the order and decree of the United States District Court for the Southern District of New York, made by Hon. Julius M. Mayer, one of the judges thereof, and entered herein on the 18th day of November, 1920, affirming an order of Peter B. Olney, Esq., referee, dated September 27, 1920, denying the claim of the United States, made herein for and on its behalf by its agent and representative, the United States Shipping Board Emergency Fleet Corporation, to priority of payment out of the assets in the

hands of the trustee, and allowing the said claim as a general claim of the United States Shipping Board Emergency Fleet Corporation against the bankrupt estate, to the Circuit Court of Appeals for the

Second Circuit, to be held in and for said circuit at the
163 United States Courts and Post Office Building in the borough of Manhattan, city of New York.

Dated, New York, November 29, 1920.

Yours, etc.

FRANCIS G. CAFFEY,

United States Attorney for the Southern District of New York, Attorney for Appellant. Office and post office address, U. S. Courts & Post Office Bldg., Borough of Manhattan, City of New York.

To—

ALEXANDER GILCHRIST, Esq.,

*Clerk of the United States District Court,
Southern District of New York.*

ROSENBERG & BALL, Esqs.,

*Attorneys for the Trustee,
74 Broadway, New York City.*

The foregoing appeal is hereby allowed.

J. M. MAYER, U. S. D. J.

Dated, November 29, 1920.

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ASSIGNMENT OF ERRORS.

United States District Court, Southern District of New York.

In the matter of Eastern Shore Shipbuilding Corporation, bankrupt. In bankruptcy #26683.

Now comes the United States Shipping Board Emergency Fleet Corporation, representing the United States of America, and files the following assignment of errors:

1. That the United States District Court for the Southern District of New York erred in affirming the order of the referee in so far as said order denied priority of payment to the claim of the United States.

2. That the said court erred in affirming the order of the referee in so far as said order, and the opinion upon which it was based, found and decided that the claim of the United States was not entitled to priority under section 64b (5) of the bankruptcy act and section 3466 of the Revised Statutes.

3. That the court erred in affirming the order of the referee
165 in so far as the said order, and the opinion upon which it was based, found and decided that the claim of the United States was not entitled to priority under section 64b (5) of the bankruptcy act and under section 3466 of the Revised Statutes by reason of the fact that the debt thereby represented was not a debt due and owing the United States.

4. That the said court erred in affirming the order of the referee, and the opinion of said referee upon which it was based, in so far

as the said order allowed the said claim against the bankrupt estate as a general claim only.

5. The said court erred in affirming the order of the referee, and the opinion of said referee upon which it was based, in so far as said order allowed the said claim against the bankrupt estate as a claim of the United States Shipping Board Emergency Fleet Corporation.

6. The said court erred in affirming the order of the referee in so far as the said order, and the opinion upon which it was based, found and decided that the claim made for on behalf of the United States of America by its agent and representative, United States Shipping Board Emergency Fleet Corporation, was not a claim due and owing the United States.

7. The said court erred in affirming the order of the referee in so far as said order, and the opinion upon which it was based, failed and omitted to decree and direct the immediate payment to the United States of the amount of its claim filed herein for and on its behalf by its agent and representative, United States
166 Shipping Board Emergency Fleet Corporation, out of any and all moneys that had come or might come into the hands of the trustee.

Wherefore, the United States Shipping Board Emergency Fleet Corporation representing the United States of America prays that the order and decree herein, for the manifest errors aforesaid, and for other errors in the records and proceedings herein may be reversed and for naught held and esteemed; and that it may be restored to all matters and things which it has lost by reason of said order and decree; and that the United States District Court for the Southern District of New York may be directed to enter and order a decree herein in favor of the United States Shipping Board Emergency Fleet Corporation representing the United States of America, allowing the aforesaid claim as a claim of the United States entitled to priority of payment, and directing the immediate payment thereof.

Dated, New York, November 29, 1920.

FRANCIS G. CAFFEY,
*United States Attorney for the
Southern District of New York.*

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CITATION. ON APPEAL.

By the Honorable JULIUS M. MAYER, one of the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To ROGER B. WOOD,

*Trustee, Eastern Shore Building Corporation, bankrupt, greet-
ing:*

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be

holden at the borough of Manhattan in the city of New York, in the district and circuit above named, on the 29th day of December, 1920, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein United States Shipping Board Emergency Fleet Corporation is appellant and you are appellee, to show cause, if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 29th day of December, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fifth.

J. M. MAYER,

*Judge of the District Court of the United States for the
Southern District of New York, in the Second Circuit.*

168 United States District Court, Southern District of New York.

IN THE MATTER OF EASTERN SHORE SHIPBUILDING CORPORATION, bankrupt.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, representing the United States of America, appellant,

against

ROGER B. WOOD, TRUSTEE IN BANKRUPTCY, APPELLEE.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated New York, January 20th, 1921.

FRANCIS G. CAFFEY,

United States Attorney, Attorney for Appellant.

ROSENBERG & BALL,

Attorneys for Appellee.

169 United States District Court, Southern District of New York.

IN THE MATTER OF EASTERN SHORE SHIPBUILDING CORPORATION, bankrupt.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, representing the United States of America, appellant,

against

ROGER B. WOOD, TRUSTEE IN BANKRUPTCY, APPELLEE.

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the

said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-fifth.

ALEX. GILCHRIST, Jr., *Clerk*.

32050

170 United States Circuit Court of Appeals, for the Second Circuit.

No. 208—October Term, 1920.

Argued April 6, 1921. Decided June 15, 1921.

Appeal from the District Court of the United States for the Southern District of New York.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

IN THE MATTER OF EASTERN SHORE SHIPBUILDING COR-	}
poration, bankrupt.	
UNITED STATES SHIPPING BOARD EMERGENCY FLEET	
Corporation, representing the United States of	
America, appellant,	
<i>against</i>	
ROGER B. WOOD, TRUSTEE IN BANKRUPTCY, APPELLEE.	

Francis G. Caffey, United States attorney, attorney for claimant-appellant.

Edward F. Unger, assistant U. S. attorney.

171 Henry J. Gibbons, Wm. Y. C. Anderson, asst. counsel,
U. S. S. B. E. F. Corp., of counsel.

Rosenberg, Ball & Marvin, attorneys for appellee; Godfrey Goldmark, of counsel.

This case comes here on appeal from the United States District Court for the Southern District of New York.

The case is stated in the opinion.

ROGERS, Circuit Judge: This case presents two questions of very considerable importance:

1. Is the United States Shipping Board Emergency Fleet Corporation, organized under the laws of the District of Columbia for and on behalf of the United States in connection with the World War, such an agent of the United States that a debt due to it from the bankrupt is in fact and in law a debt due to the United States; and is the corporation as representing the United States entitled to claim whatever right of priority of payment the United States might be entitled to assert in the case of a debt owing to the Government?

2. If the court finds that the Fleet Corporation is such an agency, and may assert such rights to priority as the United States has, is the United States itself, under the bankruptcy act, entitled to the prior payment of ordinary debts due to it as against the general creditors of the bankrupt?

It may be said concerning the second question that there seems to be no authoritative decision determining whether or not the United

States itself is entitled under the existing bankruptcy act to
172 prior payment of debts due to it as distinguished from unpaid taxes. This is rather remarkable, as the act has been in force since 1898. It will, of course, not be necessary for this court to consider the second of these questions if we find that the Fleet Corporation is not such an agent of the United States that a debt due to it can not be regarded as a debt due to the United States.

The first question which is here presented has received no consideration in any other case, at least in none which has come under our observation, or which has been brought to our attention. As contracts running into many millions of dollars have been entered into with the Fleet Corporation and many of the contractors have been made bankrupt in attempting to perform them and there are large sums due from them to the corporation as well as to private creditors, the importance of the questions involved is readily appreciated.

It appears that on August 22, 1918, the United States Shipping Board Emergency Fleet Corporation entered into a contract with the Eastern Shore Shipbuilding Corporation, hereinafter referred to as the Eastern Shore Corporation, for the construction of six wooden harbor tugs for the United States. For each of these tugs the Eastern Shore Corporation was to receive \$145,000 to be paid in 10 installments as the work progressed. After the signing of the armistice on November 11, 1918, the work under this contract was stopped, but was later resumed under supplemental agreements which it is not necessary to consider. In March, 1919, the Eastern Shore Corporation became involved in financial difficulties and receivers were appointed for it, and shortly thereafter on March 20, 1919, it was adjudicated a bankrupt. At the time of adjudication none of the 6 tugs in course of construction was completed sufficiently to launch. The Eastern Shore Corporation had been paid by the Fleet Corporation under the contract on account \$428,017.72. And after the adjudication of bankruptcy the Fleet Corporation was com-
173 pelled to expend the additional sum of \$135,161.65 in order to be able to launch the tugs and remove them from the bankrupt's shipyard. At the time of the bankruptcy the tugs were appraised at the sum of \$100,000 and this was found to be their value by the referee in bankruptcy, who deducted that amount from the sum of \$428,017.72 and allowed the balance of \$328,017.72 as a general claim of the Fleet Corporation against the bankrupt's estate, but disallowed priority to said claim on the ground that the debt represented thereby is not a debt due to the United States. On

petition to review the order of the referee the district judge affirmed it in all respects. On the appeal to this court no question is raised as to the amount due from bankrupt. The only questions involved are those stated in the beginning of this opinion.

The argument presented to us is that the Fleet Corporation by virtue of its incorporation and organization under the acts of Congress and by virtue of an Executive order of the President of the United States issued in pursuance of an act of Congress was at the time of and in the transaction out of which this controversy grew and still is the appointee of the President of the United States and the agent and representative of the United States; and that the contract with the bankrupt, having been made for and on behalf of the United States by the Fleet Corporation as the appointee of the President and the agent and representative of the United States, the debt due thereunder is a debt due and owing to the United States and therefore entitled to priority of payment under the provisions of section 64 of the bankruptcy act and of section 3466 of the Revised Statutes. The pertinent provisions of section 64,¹ and section 3466² are found in the margin.

174 In determining the question of whether the Fleet Corporation is such an agency of the United States that a debt due to it is to be regarded as a debt due to the United States it is necessary to examine the acts of Congress under which the corporation came into existence.

The act of Congress of September 7, 1916, is entitled "An act to establish a United States Shipping Board, for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions, and with foreign countries; to regulate carriers by water engaged in the foreign interstate commerce of the United States; and for other purposes." U. S. St. at L., vol. 39, ch. 451, p. 728.

The act created a board of five commissioners to be appointed by the President. It authorized the board with the approval of the President to cause to be constructed and equipped, in American shipyards or elsewhere, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit for use as naval auxiliaries or Army

¹Section 64 of the bankruptcy act reads as follows:

"Debts which have priority.—The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court. * * *; and debts owing to any person who by the laws of the States or the United States is entitled to priority."

²Section 3466 of the Revised Statutes reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

175 transports or for other naval or military purposes, and a vessel to charter, lease, or sell to any citizen of the United States any vessel so purchased or constructed.

Section 11 of the act provided for the formation of a Shipping Corporation if found necessary. It reads as follows:

"That the board, if in its best judgment such action is necessary to carry out the purposes of this act, may form, under the laws of the District of Columbia, one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed \$50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this act. The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation but at no time shall it be a minority stockholder therein: Provided, That no corporation in which the United States is a stockholder formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under such terms and conditions as may be prescribed by the board. * * *

At the expiration of five years from the conclusion of the present European War the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall
176 cease and the said corporation stand dissolved. The date of the conclusion of the war shall be declared by proclamation of the President. The vessels and other property of any such corporation shall revert to the board. The board may sell, lease, or charter such vessels as provided in section seven and shall dispose of the property other than vessels on the best available terms, and, after payment of all debts and obligations, deposit the proceeds thereof in the Treasury to its credit. All stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the board at a fair and reasonable value and paid for with funds to the credit of the board. In case of disagreement, such value shall be determined in the manner provided in section ten."

Section 13 of the act provided for a bond issue not to exceed \$50,000,000, to be used for the purpose of carrying out the provisions of the act. It contained the following among other provisions:

"The proceeds of such bonds and the net proceeds of all sales, charters, and leases of vessels and of sales of stock made by the board, and all other moneys received by it from any source, shall be covered into the Treasury to the credit of the board, and are hereby per-

mentally appropriated for the purpose of carrying out the provisions of sections five and eleven."

On April 16, 1917, in pursuance of section 11 above quoted, the Fleet Corporation, appellant herein, was organized under the laws of the District of Columbia. The corporate purposes were stated as follows:

"First. That the corporate name of the company shall be United States Shipping Board Emergency Fleet Corporation, and the object for which it is formed is the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States and in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations under said subcharter four of the incorporation laws of the District of Columbia."

June 15, 1917, Congress conferred upon the President broad powers of control over contracts for the building or purchase of ships and material. It authorized and empowered the President to exercise varied powers, and among them the power—

"To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

Another clause declared that—

"The President may exercise the power and authority hereby vested in him * * * through such agency or agencies as he shall determine from time to time; provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct." Vol. 39, St. at L., ch. 29, p. 182.

Under this authority the President made an Executive order July 11, 1917, directing that the Fleet Corporation should have and exercise all power and authority vested in him by said provision, so far as applicable to the construction of vessels, the purchase of requisitioning of vessels in process of construction, and the completion thereof, and that the Shipping Board should exercise all power and authority vested in him by said provision, so far as applicable to the taking over of title or possession, by purchase or requisition, of constructed vessels or charters therein, and the operation, management, and disposition of such vessels and of all others theretofore or thereafter acquired by the United States.

The Fleet Corporation's capital stock was fixed at \$50,000,000. All of the stock, 500,000 shares, has been issued, the United States Ship-

ping Board for and on behalf of the United States, being the record holder of all the outstanding shares, except that the trustees of the company now are, and always have had standing in their name as stockholders of record, one share of stock each, issued to them to qualify them as trustees. When any trustee resigned the certificate of stock issued to him was indorsed and assigned to the United States Shipping Board and then was cancelled, and a new share was issued to his successor. The certificates of stock issued to the board certified on their face that the "United States Shipping Board, on behalf of the United States, is the registered owner of (the specified number) shares of the stock of this company." The board held 499,993 shares, the remaining 7 shares being held by the seven trustees, each trustee holding one share.

179 From what has been said it appears that the Fleet Corporation was not created by a special act of Congress, but was formed pursuant to the general corporation law of the District of Columbia. Act of March 3, 1901, U. S. St. at L., vol. 31, ch. 854, subchapter 4, p. 1284. Section 607 of the act provides that a corporation organized under the act "shall be a body politic and corporate in fact and in name * * * and be capable of suing and being sued in any court of law or equity in the District; and * * * be capable in law of purchasing, holding, and conveying any real or personal estate whatever which may be necessary to enable the company to carry on its operations." Section 608 of the act declares that the stock, property and concerns of a company incorporated under the act "shall be managed" by not less than three nor more than fifteen trustees.

The business which the corporation was to be organized to carry on as defined in the act of 1916, heretofore quoted in this opinion, was "the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States." This definition of its business was repeated in the act of 1917, also heretofore quoted. It is again repeated unchanged in its certificate of incorporation. And it was declared in the last-named act that it was to have power "in general to do and to perform every lawful act and thing necessary or expedient to be done or performed for the efficient and profitable conducting of said business as authorized by the laws of Congress, and to have and to exercise all the powers conferred by the laws of the District of Columbia upon corporations" organized under the provisions of the statute. This language is repeated also in the certificate of incorporation.

It thus appears that the business of the Fleet Corporation was not peculiarly governmental in its nature but was commercial and
180 industrial, and that its powers were not essentially different from those possessed by private corporations. We think that no provision can be found either in the acts of Congress or in the charter of the company giving to the corporation or its stockholders any rights, privileges, or obligations different from those possessed

by any other corporation formed under the laws of the District of Columbia with respect to its business.

It is true that all the stock, except a few shares issued to qualify the members of the board of trustees, is owned by the United States. But we do not think that fact is of controlling significance especially in view of the provision on that subject in section 11 of the act of September 7, 1916. While it was provided that the United States Shipping Board might for and on behalf of the United States subscribe to and purchase the stock, it was also provided that the board might, with the approval of the President, sell any or all of the stock of the United States in the corporation subject to the restriction that the United States was at no time to be a minority stockholder. The fact that the United States owns stock in a corporation does not invest the corporation with the character of sovereignty, or invest it with the privileges and immunities of the sovereign. In the United States Bank v. Planters' Bank of Georgia, 9 Wheat., 904, the Supreme Court in 1824 had before it the case of a corporation in which the State of Georgia was a stockholder. A suit was brought in a United States court against the corporation. Chief Justice Marshall, speaking for the court, declared that the State did not by becoming a corporator identify itself with the corporation, and that the Planters' Bank of Georgia was not exempted from being sued in the Federal courts by the circumstance that that State was a corporator. He said:

181 "It is, we think, a sound principle, that when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * * The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank and waives all the privileges of that character. As a member of a corporation, a Government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.

The Government of the Union held shares in the old Bank of the United States; but the privileges of the Government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The Government by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter. We think, then, that the Planters' Bank of Georgia is

not exempted from being sued in the Federal courts by the circumstances that that State is a corporator."

In the above case the State of Georgia did not own all of the stock of the Planters' Bank, but that does not seem to us to be a material fact. In *Salas v. United States*, 234 Fed., 842, we had before use the question whether a conspiracy to defraud the Panama Railroad Company was a conspiracy to defraud the United States. We held that it was not, notwithstanding the fact that the United States owned the whole capital stock of the railroad company, and was solely interested in its profits or losses. We decided that "When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation. Although it absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the railroad company sues and is sued just like any other corporation, in its own name." See also *Lord & Burnham Company v. The Fleet Corporation*, 265 Fed., 955, 957, where it was declared that "Ownership by the Government of all of the stock of the corporation does not change the situation and it remains a corporation just the same as though it had a dozen or more stockholders."

The decision of the Supreme Court in *United States v. Strang*, rendered on January 3, 1921, and not yet reported, appears to us to lead logically to the conclusion we have reached upon the matter now under consideration. The Criminal Code, section 41, makes it a criminal offense for an officer or agent of any corporation, joint stock company, association, or firm to be employed or act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. It appeared that Strang, while he was a member of a firm of ship outfitters, was at the same time employed by the Fleet Corporation as an inspector, and in that capacity signed and executed three separate orders to his firm for repairs and alterations on a steamship. He was tried on an indictment which charged him with a violation of the section of the code above referred to. A demurrer to the indictment was sustained in the court below, and the Supreme Court affirmed. It was argued by

the Government that the Fleet Corporation was an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers and duties vested by Congress in the President, and by him delegated to it; that the acts of the corporation were the acts of the United States; that therefore Strang, in placing orders with his firm in behalf of the Fleet Corporation, acted as an agent of the United States. The court in its opinion said:

"The corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the corporation only

and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of section 41."

It also added:

"The view of Congress is further indicated by the provision in section 7, appropriation act of October 6, 1917 (40 Stats., 245, 384), 'Provided that the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section.' Also, by the act of October 23, 1918 (ch. 194, 40 Stats., 1015), which amends section 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States owns stock."

Congress by act of July 17, 1916, amended by act of January 18, 1918, has provided for the creation of Federal land banks
184 and joint stock land banks. U. S. St. at L., vol. 39, pt. 1, ch. 245, p. 360; U. S. St. at L., vol 40, ch 9, p. 431. Under section 5 of the act of 1916, it is provided that every Federal land bank shall have a subscribed capital of not less than \$750,000. It is also provided that if within 30 days after the opening of the subscription books any part of the minimum capitalization of \$750,000 shall remain unsubscribed it shall be the duty of the Secretary of the Treasury to subscribe the balance thereof on behalf of the United States. It might be possible under this provision that the United States might hold none, or some, or all of the stock of the Federal land bank. Is it possible that the question of whether these banks are to be regarded as private corporations or as a department of Government and as such invested with the attributes and privileges of the Government of the United States depends upon the number of shares of the capital stock the Secretary of the Treasury has subscribed for and holds on behalf of the United States? Can the answer be doubtful? And is it contingent upon whether the Secretary of the Treasury acting under the authority which the act confers has designated the bank as a depository of public money and employed it as a financial agent of the Government? The constitutionality of the legislation of Congress providing for the creation of these banks has recently been declared by the Supreme Court in *Smith v. Kansas City Title & Trust Co.*, 41 Supreme Court Reporter, p. 243, but the question whether banks so created are private corporations does not appear to have been raised.

Counsel for the appellant seem to attach importance to a statement made by the Supreme Court in *The Lake Monroe*, 250 U. S., 246, 254, which reads as follows:

"The emergency shipping legislation (act of June 15, 1917), was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as his agencies to
185 exercise new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the board."

But surely the fact that the Fleet Corporation was employed as an agency of the President does not of itself clothe the agency so

employed with the immunities of his office. A bank organized under the national bank act and employed by the Secretary of the Treasury under the act as a depository of public money and, to use the language of the act, as "a financial agent of the Government," does not on that account lose its character as a private corporation, and does not become immune from suit.

It can not be seriously contended, although the argument was addressed to us, that inasmuch as the Fleet Corporation was an agent of the Government it could not be personally liable on its contracts, as agents are not personally liable on contracts made by them within the scope of their authority. We are told that a contract made in the name of a public agent will be construed to be a contract of the Government and not of the agent. *Huffcutt on Agency*, 2d Ed. p. 254. This is to lose sight of the fact that the Fleet Corporation contracted as a principal in its contract with the bankrupt. It designated itself throughout the contract as owner and was careful to distinguish between itself as owner and the United States, and the debt due from the bankrupt under the contract is a debt due to it as a principal and not to the United States.

In the case under consideration in causing to be created under the general incorporation law of the District of Columbia an industrial corporation with a capital stock divided into shares and managed by a board of trustees the United States, by subscribing for the whole amount of the authorized capital stock in excess of what was needed to qualify the members of the board of trustees, did not confer upon

the company the privileges and the prerogatives of its own
186 sovereign character. It did not transform the corporation into

a department of Government or divest it of its character as a private corporation. If Congress intended that this corporation should become a department of the Government instead of a separate legal entity we are unable to discover why it should have resorted to such an indirect and extraordinary method of accomplishing its purpose. It follows therefore that a debt due to the United States Shipping Board Emergency Fleet Corporation from the bankrupt herein is not in law a debt due to the United States.

The order is affirmed.

The conclusion above announced makes it unnecessary to consider the second question mentioned at the beginning of this opinion: Whether the United States, under the bankruptcy act, is entitled to the prior payment of ordinary debts due to it as against the general creditors of the bankrupt.

187 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 25th day of June, one thousand nine hundred and twenty-one.

Present: Hon. Henry Wade Rogers, Hon. Charles M. Hough, Hon. Martin T. Manton, circuit judges.

In the matter of Eastern Shore Shipbuilding Company, bankrupt.
United States Shipping Board Emergency Fleet Corporation,
appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

H. W. R.

M. T. M.

188 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. In re Eastern Shore S. B. Co.; order for mandate. United States Circuit Court of Appeals for the Second Circuit. Filed Jun. 27, 1921. William Parkin, clerk.

189 UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 188, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of In re Eastern Shore Ship Building Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 19th day of July, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.]

WM. PARKIN, *Clerk.*

190 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which United States Shipping Board Emergency Fleet Corporation, representing the United States of America, is appellant, and Roger B. Wood, trustee in bankruptcy, is appellee, No. 208, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the

Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, 191 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the first day of November, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

192 (Endorsed:) File No. 28481. Supreme Court of the United States, No. 526, October term, 1921. United States Shipping Board Emergency Fleet Corporation, representing the United States of America, vs. Roger B. Wood, trustee in bankruptcy. Writ of certiorari. Filed Nov. 5, 1921. United States Circuit Court of Appeals, Second Circuit. William Parkin, clerk.

193 In the Supreme Court of the United States.

October Term, 1921.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET	}
Corporation, etc., petitioner,	
v.	
ROGER B. WOOD, TRUSTEE IN BANKRUPTCY, RE-	
spondent.	}

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.

ROSENBERG & BALL,
GODFREY GOLDMANN,
Counsel for Respondent.

Nov. 3, 1921.

To the honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the

Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 7th, 1921.

[SEAL.]

WM. PARKIN,
*Clerk of the United States Circuit Court
of Appeals for the Second Circuit.*

(Endorsed:) United States Circuit Court of Appeals, second circuit. United States Shipping Board Emergency Fleet Corporation *v.* Roger B. Wood, as trustee, etc. Return to certiorari. Received Nov. 9, 1921. Office of the clerk Supreme Court U. S.

(Endorsement on cover:) File No. 28481. Supreme Court U. S. October term, 1921. Term No. 526. U. S. Shipping Board, &c., petitioners, *vs.* Roger B. Wood, trustee, &c. Writ of certiorari and return. Filed Nov. 9, 1921.

